

**FILED ELECTRONICALLY**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF AMERICA CORP.  
SECURITIES, DERIVATIVE, AND  
EMPLOYMENT RETIREMENT INCOME  
SECURITY ACT (ERISA) LITIGATION

Master File No. 09 MDL 2058 (PKC)  
ECF CASE

THIS DOCUMENT RELATES TO

The Consolidated Securities Class Action

**DECLARATION OF GREGORY F. SMOLAR IN SUPPORT OF  
KENNETH D. LEWIS' MOTION FOR SUMMARY JUDGMENT**

I, Gregory F. Smolar, declare as follows:

I am an associate at the law firm of Debevoise & Plimpton LLP, attorneys for Defendant Kenneth D. Lewis in this Action. I make this declaration, on personal knowledge, which is based on my familiarity with this litigation, to put before the Court certain facts and other information in support of Defendant Kenneth D. Lewis' Motion for Summary Judgment on all of the claims remaining against him. In some instances, the attached exhibits were produced to Mr. Lewis with redactions, which are indicated with the phrase "Redacted by BAC," or another similar indication. Additionally, pursuant to this Court's January 20, 2010 Stipulation and Order Governing the Production and Exchange of Confidential Material, Debevoise & Plimpton LLP has made additional redactions to several of the exhibits to remove personal confidential information such as names, addresses, telephone numbers and the dollar amount of D&O insurance. These redactions are denoted by a redaction box bearing the legend: "D&P Redaction."

1. Attached hereto as Exhibit 1 is a true and correct copy of excerpts from Kenneth D. Lewis' March 27, 2012 deposition in this Action.

2. Attached hereto as Exhibit 2 is a true and correct copy of excerpts from Kenneth D. Lewis' March 6, 2012 deposition in the parallel derivative action pending in the Delaware Court of Chancery styled *In re Bank of Am. Corp. S'holder Derivative Litig.*, CA. No. 4307-CS.

3. Attached hereto as Exhibit 3 is a true and correct copy of excerpts from Kenneth D. Lewis' October 30, 2009 deposition in the action styled *SEC v. Bank of Am. Corp.*, 09-CV-6829 (S.D.N.Y.).

4. Attached hereto as Exhibit 4 is a true and correct copy of an excerpt from Thomas J. May's December 21, 2011 deposition taken in this Action.

5. Attached hereto as Exhibit 5 is a true and correct copy of an excerpt from Teresa Brenner's December 13, 2011 deposition in this Action.

6. Attached hereto as Exhibit 6 is a true and correct copy of excerpts from Joe L. Price's April 5 and 6, 2012 deposition taken in this Action.

7. Attached hereto as Exhibit 7 is a true and correct copy of excerpts from John Steele Alphin's November 13, 2009 deposition in the action styled *SEC v. Bank of Am. Corp.*, 09-CV-6829 (S.D.N.Y.).

8. Attached hereto as Exhibit 8 is a true and correct copy of an excerpt from Timothy Mayopoulos' March 30, 2012 deposition taken in this Action.

9. Attached hereto as Exhibit 9 is a true and correct copy of an excerpt from Charles Gifford's December 8, 2011 deposition taken in this Action.

10. Attached hereto as Exhibit 10 is a true and correct copy of excerpts from Gregory Curl's January 22, 2012 deposition in this Action.

11. Attached hereto as Exhibit 11 is a true and correct copy of excerpts from Nicholas G. Demmo's November 16, 2009 deposition in the action styled *SEC v. Bank of Am. Corp.*, 09-CV-6829 (S.D.N.Y.).

12. Attached hereto as Exhibit 12 is a true and correct copy of an excerpt from Kenneth D. Lewis' February 26, 2009 testimony before the Office of the New York Attorney General.

13. Attached hereto as Exhibit 13 is a true and correct copy of an excerpt from of Bank of America's Form 8-K, filed September 18, 2008. A complete copy of this filing can be accessed at <http://www.sec.gov/Archives/edgar/data/70858/000089882208000889/0000898822-08-000889-index.htm>.

14. Attached hereto as Exhibit 14 is a true and correct copy of excerpts from Bank of America's Definitive Proxy Statement, filed November 3, 2008. A complete copy of this filing can be accessed at <http://www.sec.gov/Archives/edgar/data/70858/000095012308014243/0000950123-08-014243-index.htm>.

15. Attached hereto as Exhibit 15 is a true and correct copy of excerpts from Nicholas G. Demmo's March 5, 2012 deposition in this Action.

16. Attached hereto as Exhibit 16 is a true and correct copy of an email and attachment from Nicholas G. Demmo to Teresa M. Brenner and others dated September 18, 2008, BAC-502-WLRK-A 00002390 to BAC-502-WLRK-A 00002391.

17. Attached hereto as Exhibit 17 is a true and correct copy of an excerpt from Jeffrey P. Crandall's November 30, 2009 deposition in the action styled *SEC v. Bank of Am. Corp.*, 09-CV-6829 (S.D.N.Y.).

18. Attached hereto as Exhibit 18 is a true and correct copy of excerpts from Jeffrey P. Crandall's January 12, 2012 deposition in this Action.

19. Attached hereto as Exhibit 19 is a true and correct copy of an email from Patricia A. Kuhn to Adam Kaminsky dated October 22, 2008, BAC-502-SS 00010821 to BAC-502-SS 00010823.

20. Attached hereto as Exhibit 20 is a true and correct copy of an excerpt from the Disclosure Schedules to the September 15, 2008 Agreement and Plan of Merger, BAC-ML-NYAG00000280-UR, BAC-ML-NYAG00000292-UR to BAC-ML-NYAG00000294-UR.

21. Attached hereto as Exhibit 21 is a true and correct copy of excerpts from Nicholas G. Demmo's January 13, 2012 deposition in the parallel derivative action pending in the Delaware Court of Chancery styled *In re Bank of Am. Corp. S'holder Derivative Litig.*, CA. No. 4307-CS.

22. Attached hereto as Exhibit 22 is a true and correct copy of an excerpt from Timothy Mayopoulos' December 22, 2011 deposition in the parallel derivative action pending in the Delaware Court of Chancery styled *In re Bank of Am. Corp. S'holder Derivative Litig.*, CA. No. 4307-CS.

23. Attached hereto as Exhibit 23 is a true and correct copy of an email from Ross A. Fieldston to Teresa Brenner and others dated September 20, 2008, BAC-502-SS 00082986.

24. Attached hereto as Exhibit 24 is a true and correct copy of an email from Craig Culbert to Richard Alsop and others dated September 24, 2008, BAC-502-SS 00058964 to BAC-502-SS 00058965.

25. Attached hereto as Exhibit 25 is a true and correct copy of an email from James Cuneo to "WLRK Team – Internal" dated October 1, 2008, BAC-502-WLRK-A 00022370.

26. Attached hereto as Exhibit 26 is a true and correct copy of an excerpt from JeanneMarie O'Brien's November 20, 2009 deposition in the action styled *SEC v. Bank of Am. Corp.*, 09-CV-6829 (S.D.N.Y.).

27. Attached hereto as Exhibit 27 is a true and correct copy of excerpts from Neil Cotty's March 16, 2012 deposition in this Action.

28. Attached hereto as Exhibit 28 is a true and correct copy of an attachment from an email from Nancy Meloth to Neil Cotty, copying others, dated November 12, 2008, BAC-ML-NYAG10106372 to BAC-ML-NYAG10106385.

29. Attached hereto as Exhibit 29 is a true and correct copy of an excerpt from Neil Cotty's January 19, 2012 deposition in the parallel derivative action pending in the Delaware Court of Chancery styled *In re Bank of Am. Corp. S'holder Derivative Litig.*, CA. No. 4307-CS.

30. Attached hereto as Exhibit 30 is a true and correct copy of an excerpt from Neil Cotty's December 16, 2009 deposition in the action styled *SEC v. Bank of Am. Corp.*, 09-CV-6829 (S.D.N.Y.).

31. Attached hereto as Exhibit 31 is a true and correct copy of "Merrill Lynch & Co 2008 4Q Pacing & FY Forecast Scenario," dated December 3, 2008, BAC-ML-NYAG-502-00064560 to BAC-ML-NYAG-502-00064565.

32. Attached hereto as Exhibit 32 is a true and correct copy of Plaintiffs' Response to Interrogatory No. 2 of Kenneth D. Lewis' First Set of Interrogatories to Plaintiffs, as excerpted from Plaintiffs' Responses and Objections to Kenneth D. Lewis' First Set of Interrogatories to Plaintiffs, dated May 14, 2012.

33. Attached hereto as Exhibit 33 is a true and correct copy of an excerpt from Bank of America's Form 424(b)(5), filed October 9, 2008. A complete copy of this filing can be

accessed online at

<http://www.sec.gov/Archives/edgar/data/70858/000095014408007527/0000950144-08-007527-index.htm>.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Washington, D.C.  
June 3, 2012

/s/ Gregory F. Smolar

# **Exhibit 1**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

1  
2 \*\* C O N F I D E N T I A L \*\*

3 UNITED STATES DISTRICT COURT  
4 SOUTHERN DISTRICT OF NEW YORK

Master File No. 09-MD-2058 (PKC)

-----x

5  
6 IN RE BANK OF AMERICA CORP. SECURITIES,  
7 DERIVATIVE AND EMPLOYMENT RETIREMENT  
8 INCOME SECURITY ACT (ERISA) LITIGATION

-----x

9 THIS DOCUMENT RELATES TO  
10 All Securities Actions

11 -----x

March 27, 2012

9:03 a.m.

12  
13  
14  
15 Videotaped Deposition of KENNETH D.  
16 LEWIS, taken by Plaintiffs, pursuant to  
17 Notice, held at the Ritz-Carlton Golf  
18 Resort, 2600 Tiburon Drive, Naples,  
19 Florida, before Todd DeSimone, a  
20 Registered Professional Reporter and  
21 Notary Public.



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1 LEWIS - CONFIDENTIAL

2 was 2000 to 2009. 09:12:17AM

3 Q. What's the difference between 09:12:19AM

4 CEO and president? 09:12:20AM

5 A. Well, the CEO is the person in 09:12:22AM

6 charge, at least in our company that was 09:12:26AM

7 the most powerful title, and you can -- at 09:12:29AM

8 some point I had planned to give that 09:12:34AM

9 title to the person that would be my 09:12:36AM

10 successor and named somebody chief 09:12:39AM

11 operating officer. As it turned out, we 09:12:43AM

12 didn't take that step. 09:12:45AM

13 Q. Let's deal with the 2001 to 09:12:47AM

14 2009 time period. Other than CEO, 09:12:52AM

15 president and chairman, did you hold any 09:12:55AM

16 other titles or positions at Bank of 09:12:56AM

17 America? 09:12:58AM

18 A. Not that I recall. 09:12:58AM

19 Q. Could you just describe, just 09:12:59AM

20 generally for me, your educational 09:13:04AM

21 background. You don't have to go to high 09:13:05AM

22 school. Just college and any advanced 09:13:08AM

23 degrees is fine. 09:13:09AM

24 A. I have an undergraduate degree 09:13:10AM

25 from Georgia State University in Atlanta 09:13:15AM

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1                   LEWIS - CONFIDENTIAL

2       in finance, bachelor of business                   09:13:17AM

3       administration. And this isn't a degree,           09:13:20AM

4       but I spent about a month and a half I           09:13:22AM

5       think it was at Stanford at their                09:13:24AM

6       executive program.                                09:13:26AM

7           Q.       Now, you've been deposed before 09:13:29AM

8       in connection with what we will call the           09:13:33AM

9       Bank of America/Merrill Lynch merger,           09:13:36AM

10      right?    09:13:38AM

11      A.       Right.                                   09:13:39AM

12      Q.       And I'm going to ask you, we           09:13:39AM

13      will do it this way, I think it will be           09:13:42AM

14      quicker, because I want to find out how           09:13:45AM

15      many times and by whom.                         09:13:47AM

16                   You have been deposed by the           09:13:48AM

17      New York Attorney General's office,           09:13:49AM

18      correct?   09:13:50AM

19      A.       Correct.                                09:13:51AM

20      Q.       And how many times were you           09:13:51AM

21      deposed by them?                                09:13:52AM

22      A.       Once.                                    09:13:53AM

23      Q.       And that was in February 2009;       09:13:54AM

24      do you recall?                                  09:13:57AM

25      A.       It was around then. I can't           09:13:57AM

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1                   LEWIS - CONFIDENTIAL

2       didn't say this at the start, because I       09:50:20AM

3       know you have been through this before,       09:50:22AM

4       but if you need to take a break.       09:50:23AM

5           A.       Because I'm 65 years old?       09:50:25AM

6           Q.       No, because actually I'll       09:50:28AM

7       probably need to take one before you do,       09:50:29AM

8       and I'm 45, there you go. But, you know,       09:50:32AM

9       just let me know.       09:50:34AM

10          A.       I have until April the 9th to       09:50:35AM

11       be 65. I shouldn't be declaring I'm 65       09:50:38AM

12       before I am.       09:50:41AM

13          Q.       You get like -- Social Security       09:50:41AM

14       kicks in. No, it might be kicked in -- I       09:50:41AM

15       don't even know. Well, happy birthday.       09:50:45AM

16          A.       Thank you.       09:50:47AM

17          Q.       Now, you've previously       09:50:50AM

18       testified, you know, actually in the       09:50:52AM

19       Delaware case, I think, that you became       09:50:55AM

20       aware that Merrill Lynch had -- that you       09:50:57AM

21       became aware sometime in November 2008       09:51:00AM

22       that Merrill Lynch had suffered some       09:51:03AM

23       significant losses; do you recall that       09:51:05AM

24       testimony?       09:51:07AM

25          A.       Yeah, I recall that testimony       09:51:07AM

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1                   LEWIS - CONFIDENTIAL

2       and I recall the fact that I did in                   09:51:12AM

3       November learn of some significant losses,           09:51:15AM

4       yes.   09:51:18AM

5           Q.           When did you learn of that?           09:51:18AM

6           A.           All I can recall is sometime in       09:51:21AM

7       November. The best I can recall it was a           09:51:25AM

8       \$5 billion number. But that's vague, too.           09:51:28AM

9           Q.           Can I just give you, I mean,           09:51:31AM

10       was it early November, was it around               09:51:34AM

11       Thanksgiving, do you recall anything               09:51:36AM

12       about --   09:51:38AM

13           A.           I can't recall.                   09:51:38AM

14           Q.           How did you learn of that? I       09:51:43AM

15       mean, who told you?                                   09:51:48AM

16           A.           It would be -- it would have       09:51:49AM

17       been Joe Price. I don't recall the form.           09:51:51AM

18       But he would have been my point person               09:51:54AM

19       that would tell me something like that.               09:51:56AM

20           Q.           And how did he tell you about       09:51:58AM

21       this? How did it happen?                               09:51:59AM

22           A.           I don't remember. Either I was       09:52:01AM

23       constantly walking into his office or he           09:52:06AM

24       was constantly walking into mine. It was           09:52:08AM

25       not a formal relationship. He was next               09:52:12AM

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1 LEWIS - CONFIDENTIAL

2 door, in the next office. I don't know if 09:52:15AM  
3 he showed me something or he just told me, 09:52:17AM  
4 but I remember that number. 09:52:21AM

5 Q. And what did he say when he 09:52:25AM  
6 told you about that number? 09:52:26AM

7 A. All I recall is the number. I 09:52:27AM  
8 don't recall what he said. 09:52:29AM

9 Q. Did he tell you what that \$5 09:52:30AM  
10 billion consisted of? 09:52:34AM

11 A. He might very well have. I 09:52:37AM  
12 just don't remember. 09:52:38AM

13 Q. Did he tell you, and I'm 09:52:41AM  
14 talking about in November, this 09:52:43AM  
15 conversation, this is the first time you 09:52:45AM  
16 have learned of -- this is the first time 09:52:47AM  
17 you learned that Merrill suffered losses, 09:52:49AM  
18 correct? 09:52:51AM

19 A. As far as I can recall. 09:52:51AM

20 Q. And did Mr. Price say anything 09:52:54AM  
21 about losses that Merrill had suffered in 09:52:57AM  
22 the month of October? 09:52:59AM

23 A. I don't recall that. But that 09:53:01AM  
24 estimate would have included those. 09:53:09AM

25 Q. The estimate would have 09:53:12AM



1 LEWIS - CONFIDENTIAL

2 my best to try to figure out, you know, 10:03:48AM

3 what you did or what you recall. 10:03:50AM

4 A. If I could recall, I mean, I 10:03:52AM

5 would tell you, obviously, but I don't. 10:03:53AM

6 Q. Just so I'm clear, okay, you 10:03:55AM

7 don't recall speaking to anyone at Merrill 10:03:59AM

8 Lynch about the losses, correct? 10:04:01AM

9 A. I don't know if I did or 10:04:02AM

10 didn't, but I don't recall. 10:04:03AM

11 Q. Did you talk to the board about 10:04:05AM

12 these losses? Again, this is November, 10:04:08AM

13 right around the time when Mr. Price gives 10:04:10AM

14 you this number. 10:04:12AM

15 A. I do not recall. 10:04:13AM

16 Q. Did you talk to anyone at J.C. 10:04:14AM

17 Flowers? 10:04:19AM

18 A. No. I'm 99.9 percent sure I 10:04:19AM

19 didn't have any conversations with J.C. 10:04:27AM

20 Flowers or anybody there. 10:04:27AM

21 Q. Did you tell Mr. Price to do 10:04:29AM

22 anything? 10:04:30AM

23 A. I don't recall. 10:04:30AM

24 Q. Now, you also previously 10:04:32AM

25 testified, and, again, this is actually 10:04:41AM

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1                   LEWIS - CONFIDENTIAL

2       just a couple of weeks ago, that during       10:04:44AM

3       this conversation you had with Mr. Price       10:04:47AM

4       in November you and he also discussed the       10:04:49AM

5       issue of disclosure of Merrill Lynch's       10:04:52AM

6       losses. Do you recall that testimony?       10:04:54AM

7       A.       No. In November?       10:04:55AM

8       Q.       Yeah, November.       10:04:57AM

9       A.       No.       10:04:58AM

10      Q.       Let me ask you, did you discuss       10:04:59AM

11      the issue of disclosure of Merrill Lynch's       10:05:04AM

12      losses --       10:05:07AM

13      A.       Excuse me, I'm sorry, I'm       10:05:08AM

14      sorry. I was thinking -- I was thinking       10:05:09AM

15      December and the meeting of November. I       10:05:13AM

16      apologize.       10:05:17AM

17      Q.       No problem.       10:05:17AM

18      A.       He came to me at some point,       10:05:19AM

19      and it was November, I'm pretty sure, and       10:05:22AM

20      said that he had gone -- he had gone to       10:05:26AM

21      Tim Mayopoulos, the general counsel, and       10:05:30AM

22      discussed the issue of should there be an       10:05:33AM

23      announcement. And best I can recall --       10:05:41AM

24      oh, and I also think that Tim consulted       10:05:46AM

25      with someone at Wachtell Lipton. I'm not       10:05:51AM



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1 LEWIS - CONFIDENTIAL

2 sure I remember all of the reasons that 10:05:56AM  
3 they thought there was not disclosure. 10:05:57AM

4 I remember him saying that, 10:05:59AM  
5 number one, there was acknowledgment there 10:06:01AM  
6 was huge volatility in the marketplace, 10:06:03AM  
7 that the proxy described volatile 10:06:09AM  
8 instruments subject to change in market 10:06:13AM  
9 value, the fact that Merrill had had 10:06:16AM  
10 larger losses than that in the past, the 10:06:22AM  
11 fact that there had been no predictions 10:06:27AM  
12 publicly of any profits or losses in the 10:06:31AM  
13 fourth quarter. 10:06:34AM

14 There may have been -- there 10:06:35AM  
15 may have been some more. At some times -- 10:06:39AM  
16 at some point I recall they were still 10:06:41AM  
17 single-digit, at that point they were 10:06:45AM  
18 single-digit and not double-digit, and 10:06:47AM  
19 that kind of related to the point about 10:06:49AM  
20 Merrill's losses being higher in other 10:06:51AM  
21 quarters. And there is probably something 10:06:54AM  
22 I'm missing. But that's what I recall 10:06:56AM  
23 about the reasons given for nondisclosure. 10:06:58AM

24 Q. Okay. This conversation you 10:07:00AM  
25 had with Mr. Price in November, was this 10:07:02AM

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1 LEWIS - CONFIDENTIAL

2 about the issue of disclosure of the 10:07:48AM  
3 losses? 10:07:50AM

4 A. I've given you every -- to the 10:07:51AM  
5 extent he said something else, I can't 10:07:54AM  
6 recall, but those are what -- those are 10:07:57AM  
7 the points I remember him making or 10:07:58AM  
8 relaying from Tim. 10:08:02AM

9 Q. What did you say in response? 10:08:04AM

10 A. I said okay, well, we've got it 10:08:07AM  
11 in the hands of the experts. I didn't say 10:08:13AM  
12 that. But I said something to the point 10:08:15AM  
13 that the right people had looked at it and 10:08:19AM  
14 we will go by their decision. 10:08:23AM

15 Q. What did Mr. Price say about -- 10:09:01AM  
16 and I realize you said -- you talked about 10:09:05AM  
17 some of the reasons or the reasons that he 10:09:10AM  
18 said about not disclosure. What did he 10:09:12AM  
19 say specifically? Did he say we shouldn't 10:09:14AM  
20 disclose this? Did he say we are not 10:09:16AM  
21 legally required to disclose it? What did 10:09:18AM  
22 he say about that? 10:09:20AM

23 A. I don't recall the exact 10:09:21AM  
24 terminology used, but it made me believe 10:09:23AM  
25 that it was not an issue. 10:09:29AM

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1 LEWIS - CONFIDENTIAL

2 Q. Did Price tell you why he went 10:10:44AM  
3 to Tim Mayopoulos in the first place? 10:10:52AM

4 A. Well, that would be -- that 10:10:55AM  
5 would be how the process works. I mean, 10:10:57AM  
6 we leave that decision to the combination 10:10:59AM  
7 of our Finance Group and Legal Group, and 10:11:03AM  
8 I think even Risk Management gets 10:11:06AM  
9 involved. 10:11:09AM

10 But they are in charge of 10:11:09AM  
11 disclosure, and they are -- and then Joe 10:11:11AM  
12 is the point person to come to me. But it 10:11:14AM  
13 is something that I allow the decision to 10:11:17AM  
14 be made at that level, so it is pure, that 10:11:21AM  
15 the experts make that call. 10:11:23AM

16 Q. When you say the process, what 10:11:25AM  
17 process are you referring to? 10:11:27AM

18 A. Well, it is just, I guess I 10:11:28AM  
19 should call it the practice that we've 10:11:30AM  
20 employed for as long as I can recall. 10:11:34AM

21 Q. And practice about what? 10:11:36AM

22 A. Of how disclosure comes about. 10:11:39AM

23 Q. Did Bank of America have a 10:11:41AM  
24 policy about disclosure? Because you draw 10:11:42AM  
25 a distinction. 10:11:46AM

1                   LEWIS - CONFIDENTIAL

2       five paragraphs down, "Mr. Price provided       10:58:15AM

3       a Merrill Lynch update"?                   10:58:18AM

4           A.       Right.                   10:58:19AM

5           Q.       "Discussion ensued, including       10:58:19AM

6       government actions, potential accounting       10:58:21AM

7       rule changes, proposed tactics of           10:58:23AM

8       competitors, and OCC directives."           10:58:25AM

9                   Do you see that?           10:58:28AM

10          A.       I do.                   10:58:28AM

11          Q.       During this -- this was a phone   10:58:29AM

12       call. During this telephone conference of   10:58:32AM

13       the board of directors, did Mr. Price say   10:58:35AM

14       anything to the board regarding Merrill       10:58:38AM

15       Lynch's fourth quarter losses?           10:58:41AM

16          A.       I don't recall this meeting,       10:58:43AM

17       much less any specific discussion. I know   10:58:46AM

18       we had them, and obviously we had this       10:58:49AM

19       meeting, but I don't recall it.           10:58:52AM

20          Q.       So you don't recall whether or     10:58:53AM

21       not he informed the board -- said anything   10:58:56AM

22       about Merrill Lynch's fourth quarter       10:58:59AM

23       losses during this telephone call?           10:59:01AM

24          A.       I don't recall.           10:59:03AM

25          Q.       Now, at some point after the --   10:59:03AM

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1                   LEWIS - CONFIDENTIAL

2           at some point in December 2008, you           10:59:24AM

3           learned that Merrill's fourth quarter           10:59:30AM

4           losses had increased; is that correct?           10:59:32AM

5           A.           That's correct.           10:59:33AM

6           Q.           And when was that?           10:59:34AM

7           A.           I do remember two dates,           10:59:35AM

8           December 3rd and then December 5th,           10:59:38AM

9           because that's my sister's birthday. But           10:59:40AM

10          December 3rd was both a profit plan           10:59:43AM

11          meeting and an update on the Merrill           10:59:47AM

12          losses. And I recall a \$7 billion number.           10:59:50AM

13          Q.           Just so I'm clear, so you           10:59:55AM

14          learned about \$5 billion in losses           10:59:59AM

15          sometime in November, right?           11:00:02AM

16          A.           Correct.           11:00:05AM

17          Q.           And the next thing -- and then           11:00:09AM

18          December 3rd you learned that losses had           11:00:10AM

19          grown to \$7 billion, correct?           11:00:12AM

20          A.           Estimated losses for the           11:00:14AM

21          quarter, yes.           11:00:15AM

22          Q.           Estimated losses had grown to           11:00:15AM

23          \$7 billion.           11:00:18AM

24                   In between those periods of           11:00:19AM

25          time, when Mr. Price talked to you about           11:00:21AM

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2 Q. So on December 3rd you learned 11:01:07AM  
3 the estimated loss had grown to \$7 11:01:13AM  
4 billion. And how did you learn that? 11:01:17AM  
5 Tell me. 11:01:19AM

6 A. There was a meeting with Joe 11:01:20AM  
7 Price, Neil Cotty, John Thain and myself, 11:01:23AM  
8 it may have been somebody else, but that's 11:01:27AM  
9 who I recall being in the meeting. And to 11:01:29AM  
10 the best of my recollection, John was on 11:01:31AM  
11 the phone, but that's just my 11:01:33AM  
12 recollection. 11:01:36AM

13 Q. And where were -- so Mr. Thain 11:01:39AM  
14 was on the phone? 11:01:42AM

15 A. Right. 11:01:43AM

16 Q. And where were you and 11:01:44AM  
17 Mr. Price and Mr. Cotty? 11:01:48AM

18 A. To the best of my knowledge, it 11:01:50AM  
19 was in Joe Price's office at his 11:01:51AM  
20 conference table. It could have been in 11:01:56AM  
21 my conference room. But I think that it 11:01:58AM  
22 was in his office. 11:02:01AM

23 Q. And what was the purpose of the 11:02:02AM  
24 call? 11:02:04AM

25 A. Well, there were several 11:02:05AM

1                   LEWIS - CONFIDENTIAL

2       estimate, 20 days, loss of another \$1.842       11:05:29AM

3       billion. So according to date, estimate       11:05:34AM

4       is almost \$6.4 billion, and then December       11:05:38AM

5       BTG -- what does BTG mean? Do you see       11:05:42AM

6       that?       11:05:46AM

7           A.       I don't know what that stands       11:05:46AM

8       for.       11:05:47AM

9           Q.       Probably something to go?       11:05:48AM

10       Balance to go, I'm told. All right, we       11:05:52AM

11       got it.       11:05:54AM

12       A.       Balance to go.       11:05:54AM

13       Q.       Balance to go, okay. But I       11:05:55AM

14       read this correctly, right, in terms of       11:05:58AM

15       the numbers on here?       11:05:59AM

16       A.       Yes.       11:06:00AM

17       Q.       Now, during this call, there       11:06:00AM

18       was a discussion about increasing the       11:06:07AM

19       projected losses for the fourth quarter of       11:06:12AM

20       2008, correct?       11:06:15AM

21       A.       No, I wouldn't characterize it       11:06:17AM

22       as that. To the best of my recollection,       11:06:19AM

23       after we looked at this, I asked Neil       11:06:22AM

24       Cotty, "Neil, obviously," and said       11:06:24AM

25       "obviously the market is so volatile, it       11:06:28AM

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2   is hard to predict, but give me a downside   11:06:31AM

3   on this number."   11:06:34AM

4                   My recollection is he said,   11:06:36AM

5   "Well, I will say \$2 billion, but I need   11:06:37AM

6   to describe it as a wild-ass guess, a   11:06:43AM

7   WAG." And then subsequently he put the   11:06:47AM

8   guess into -- added it to the \$7 billion.   11:06:49AM

9       Q.       Did he use that -- he used that   11:06:53AM

10   word, "this is a wild-ass guess"?   11:06:56AM

11       A.       Right.   11:06:58AM

12       Q.       Or did he call it a WAG?   11:06:58AM

13       A.       Well, I don't know if he said   11:07:01AM

14   "WAG" or "wild-ass guess," but he said one   11:07:03AM

15   or the other.   11:07:06AM

16       Q.       Well, which one did he --   11:07:07AM

17       A.       I don't recall.   11:07:09AM

18       Q.       But he either said this is a   11:07:10AM

19   wild-ass guess or a WAG, and it is -- what   11:07:12AM

20   did you say, \$2 billion?   11:07:15AM

21       A.       \$2 billion is what I recall   11:07:17AM

22   after tax.   11:07:19AM

23       Q.       Why were you asking him --   11:07:19AM

24   after tax, okay. What was it pretax, \$3   11:07:20AM

25   billion?   11:07:22AM



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1 LEWIS - CONFIDENTIAL

2 A. \$3 billion, yeah. 11:07:22AM

3 Q. Why were you asking him about 11:07:24AM  
4 downside in this number? 11:07:28AM

5 A. Well, it just -- the numbers 11:07:30AM  
6 seemed to get bigger, you know, each time 11:07:32AM  
7 we looked at it in terms of because it was 11:07:35AM  
8 an estimate. So the previous estimate 11:07:38AM  
9 would have been for the entire period, and 11:07:40AM  
10 so this new estimate for the entire period 11:07:42AM  
11 had grown and I wanted to kind of have a 11:07:45AM  
12 downside. 11:07:49AM

13 Q. So he said \$3 billion pretax, 11:07:50AM  
14 or \$2 billion after tax, whatever it is, 11:08:08AM  
15 the downside, and what did you say in 11:08:10AM  
16 response to that? 11:08:12AM

17 A. I don't recall, but, again, we 11:08:13AM  
18 put it in the number. 11:08:15AM

19 Q. Mr. Cotty testified in this 11:08:17AM  
20 case, I will just tell you, I will try to 11:08:20AM  
21 refresh your recollection, he said that -- 11:08:22AM  
22 he said "I think we were going to go on to 11:08:28AM  
23 2009, and Ken said something to the 11:08:32AM  
24 effect, wait a minute, Neil, we've got to 11:08:34AM  
25 close down 2008. And Ken asked John how 11:08:37AM

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2 Wachtell memo, and it says that, you know, 11:41:02AM  
3 the need to reduce assets was identified 11:41:04AM  
4 just before Thanksgiving. So I'm just 11:41:06AM  
5 wondering if that would ring a bell that 11:41:08AM  
6 here we are right before Thanksgiving, 11:41:11AM  
7 this came up. 11:41:14AM

8 A. No, it doesn't ring a bell. 11:41:14AM

9 Q. You also had a -- withdrawn. 11:41:16AM  
10 You've also I think testified 11:41:35AM  
11 to the SEC that you had a discussion with 11:41:38AM  
12 Mr. Price on December 3rd, 2008 regarding 11:41:41AM  
13 disclosure of Merrill's losses, a second 11:41:45AM  
14 conversation? 11:41:47AM

15 A. Right. 11:41:48AM

16 Q. Is that accurate? 11:41:48AM

17 A. Yes. 11:41:49AM

18 Q. And you remember it being 11:41:49AM  
19 December 3rd? 11:41:50AM

20 A. I do not remember the date. 11:41:52AM  
21 But I remember -- I remember the 11:41:53AM  
22 conversation with Joe. 11:41:55AM

23 Q. Tell me, do you recall 11:41:56AM  
24 generally the timing of that conversation? 11:41:59AM

25 A. I don't. 11:42:00AM

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1 LEWIS - CONFIDENTIAL

2 Q. Tell me the -- 11:42:01AM

3 A. I know it was before December 11:42:02AM  
4 the 5th. That's all I remember. 11:42:04AM

5 Q. Tell me about that 11:42:06AM  
6 conversation. 11:42:09AM

7 A. I can't remember it verbatim, 11:42:09AM  
8 but he said he had gone to Tim Mayopoulos, 11:42:14AM  
9 and I don't know if he said Herlihy, or 11:42:19AM  
10 Ed, but I knew who it was, that is 11:42:23AM  
11 somebody at Wachtell Lipton, and gone over 11:42:26AM  
12 the issue of disclosure again. I said 11:42:28AM  
13 gone to, I meant talked to; I don't mean 11:42:30AM  
14 necessarily physically going there. 11:42:33AM

15 And the word back was that the 11:42:39AM  
16 same reasons that were given in November, 11:42:41AM  
17 they still held. 11:42:44AM

18 Q. I don't know if you were 11:42:52AM  
19 finished. 11:42:54AM

20 A. I'm finished, yes. 11:42:55AM

21 Q. Well, what prompted Mr. Price 11:42:57AM  
22 to go back to Mr. Mayopoulos at that time; 11:43:02AM  
23 do you recall? 11:43:07AM

24 A. I don't recall. It seems 11:43:07AM  
25 logical that if you went with 5, you would 11:43:10AM

1 LEWIS - CONFIDENTIAL

2 go with 7 plus 2. 11:43:15AM

3 Q. Did Mr. Price tell you why he 11:43:17AM  
4 had gone back to Mr. Mayopoulos? 11:43:28AM

5 A. I don't recall him saying. He 11:43:30AM  
6 just said he -- the best I can recall, he 11:43:31AM  
7 just said he had done that. 11:43:33AM

8 Q. And did he tell you -- you said 11:43:34AM  
9 7 plus 2. Did he tell you he gave him -- 11:43:37AM  
10 withdrawn. 11:43:41AM

11 Mr. Price didn't say anything, 11:43:41AM  
12 but you are assuming that Mr. Price went 11:43:45AM  
13 back to Mr. Mayopoulos because you now had 11:43:47AM  
14 a larger estimate for Merrill Lynch's 11:43:49AM  
15 fourth quarter, right? 11:43:51AM

16 A. Correct. 11:43:52AM

17 Q. What was the estimate at the 11:43:53AM  
18 time -- or what estimate did Mr. Price 11:43:55AM  
19 provide Mr. Mayopoulos? 11:43:57AM

20 A. I don't know, because I wasn't 11:43:59AM  
21 privy to the conversation. My assumption 11:44:01AM  
22 was that it was \$9 billion. 11:44:03AM

23 Q. And what is your assumption 11:44:05AM  
24 based on? 11:44:06AM

25 A. Because we had added the two 11:44:07AM

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1                   LEWIS - CONFIDENTIAL

2       anticipated that, yes.                   12:17:53PM

3           Q.           And also accurate at the time       12:17:54PM

4       of due diligence what you were estimating       12:17:55PM

5       dilution to be, right?                   12:17:57PM

6           A.           Yeah, as best as I can recall,       12:17:58PM

7       yeah.                   12:18:01PM

8           Q.           That's a significant change in       12:18:01PM

9       the dilution and accretion analysis; you       12:18:07PM

10      would agree with that?                   12:18:10PM

11           A.           Yes.                   12:18:11PM

12           Q.           And you are aware in this           12:18:11PM

13      case -- accretion was important to you in       12:18:16PM

14      doing this deal, right? I think you           12:18:17PM

15      testified that that was something you were       12:18:19PM

16      very focused on; is that fair to say?       12:18:21PM

17           A.           Right.                   12:18:23PM

18           Q.           And Bank of America and Merrill       12:18:23PM

19      Lynch, I think we've said, they filed a       12:18:26PM

20      joint proxy statement in connection with       12:18:28PM

21      the merger, right?                   12:18:30PM

22           A.           Right.                   12:18:31PM

23           Q.           On or about November 3rd?           12:18:32PM

24           A.           I don't recall the date.           12:18:35PM

25           Q.           Did you read that proxy before       12:18:37PM

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1                   LEWIS - CONFIDENTIAL

2       it was filed?                   12:18:38PM

3       A.       I did.                   12:18:39PM

4       Q.       Did you read the whole thing?   12:18:40PM

5       A.       I read it. I didn't proofread   12:18:41PM

6       it, but I read it.                   12:18:43PM

7       Q.       The whole thing, you read?   12:18:44PM

8       A.       Uh-huh.                   12:18:45PM

9       Q.       You sat down and read it?   12:18:46PM

10      A.       Uh-huh.                   12:18:47PM

11      Q.       Do you recall there being in   12:18:48PM

12      there a section entitled Bank of America's   12:18:56PM

13      Reasons for the Merger, Recommendations of   12:18:58PM

14      the Bank of America Board of Directors?   12:19:01PM

15      A.       I recall reading that section,   12:19:02PM

16      but I don't recall the reasons.           12:19:05PM

17      Q.       Let me hand it to you. So I'm   12:19:07PM

18      going to show you -- you can put -- just   12:19:11PM

19      leave that open, that one.           12:19:15PM

20              But I'm going to show you what   12:19:17PM

21      has been marked as Plaintiffs' Exhibit   12:19:19PM

22      149, and this is actually a copy of the   12:19:20PM

23      joint proxy. You can ignore I guess the   12:19:27PM

24      first couple of pages. But, in any event,   12:19:31PM

25      please just take a look at that, if you   12:19:34PM

1                   LEWIS - CONFIDENTIAL

2       Mr. Alphin that Merrill Lynch had paid its       03:29:10PM

3       bonuses prior to year-end, what did you       03:29:13PM

4       say to him?       03:29:15PM

5           A.       Well, I don't recall what I       03:29:17PM

6       said to him.       03:29:18PM

7           Q.       Did you do anything?       03:29:20PM

8           A.       Not to my recollection.       03:29:22PM

9           Q.       Did you speak to John Thain?       03:29:23PM

10          A.       I don't recall speaking to him. 03:29:26PM

11       I may have, but I don't recall speaking to 03:29:27PM

12       him.       03:29:29PM

13          Q.       Do you recall speaking to       03:29:29PM

14       anyone about this issue other than       03:29:30PM

15       Mr. Alphin?       03:29:32PM

16          A.       No, I do not. I very well       03:29:33PM

17       could have talked to, again, Temple Sloan   03:29:35PM

18       about it, but I don't recall the       03:29:38PM

19       conversation.       03:29:39PM

20          Q.       Now, at some point did you       03:29:39PM

21       learn that Bank of America had       03:29:42PM

22       contractually agreed to allow Merrill       03:29:44PM

23       Lynch to pay bonuses to its employees       03:29:47PM

24       before year-end?       03:29:50PM

25          A.       No. I learned at some point       03:29:52PM

1                   LEWIS - CONFIDENTIAL

2       that there was -- that we had jointly                   03:29:55PM

3       agreed to a ceiling on the amount of                   03:29:59PM

4       bonuses to be paid, but I don't recall the           03:30:02PM

5       issue of when they paid them being an               03:30:03PM

6       issue.   03:30:05PM

7           Q.           When did you become aware of           03:30:09PM

8       that joint agreement to the ceiling on the           03:30:59PM

9       amount of bonuses?                                       03:31:06PM

10       A.           I don't remember.                       03:31:07PM

11       Q.           Was it in 2008?                           03:31:07PM

12       A.           I don't recall.                           03:31:09PM

13       Q.           It could have been after 2008?           03:31:10PM

14       A.           I guess it could have been. I           03:31:13PM

15       just don't remember.                                   03:31:15PM

16       Q.           What was your reaction to that           03:31:15PM

17       when you found that out?                               03:31:18PM

18       A.           Well, I would expect them to           03:31:20PM

19       pay bonuses. I would hope they would pay           03:31:22PM

20       bonuses so they could retain the key               03:31:24PM

21       people. I didn't focus on the amount               03:31:26PM

22       because I knew Steele and Andrea Smith had           03:31:28PM

23       probably focused on that.                               03:31:31PM

24       Q.           So did you think that even with           03:32:04PM

25       the cap in place, was it your                           03:32:07PM



## **Exhibit 2**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

C.A. No. 4307-CS

IN RE: BANK OF AMERICA  
CORPORATION STOCKHOLDER  
DERIVATIVE LITIGATION,

\*\*\* CONFIDENTIAL \*\*\*

VIDEOTAPED DEPOSITION OF KENNETH D. LEWIS

Taken on Behalf of the Plaintiffs

DATE TAKEN: MARCH 6, 2012  
TIME: 8:59 a.m. - 6:26 p.m.  
PLACE: LA PLAYA BEACH & GOLF RESORT  
9891 GULF SHORE DRIVE  
NAPLES, FLORIDA 34108

Examination of the witness taken before:

Joan L. Pitt  
Registered Merit Reporter  
Certified Realtime Reporter  
Florida Professional Reporter  
HUDSON REPORTING & VIDEO 1-800-310-1769

1 this document?

2 A. I don't recall having any input. I have read  
3 it.

4 Q. Did you read it before it was mailed to the  
5 stockholders?

6 A. Yes, as best I can recall, I saw a draft before  
7 it was -- before it was sent.

8 Q. Did you go through it and --

9 A. I did.

10 Q. Did you review it for accuracy?

11 A. I did.

12 Q. Let me ask you to look at page 49. There's a  
13 section that begins Background of the Merger. Do you  
14 see that?

15 A. I do.

16 Q. Did you review that section?

17 A. I did.

18 Q. Find anything to be inaccurate?

19 A. Not that I -- no, because I would have called  
20 somebody and told them.

21 Q. Let me ask you to look at page -- the section  
22 beginning on page 54 that's titled Bank of America  
23 Reasons for the Merger, Recommendation of the Bank of  
24 America Board of Directors. Do you see that?

25 A. I do.

1 Q. Did you review that section?

2 A. I did.

3 Q. Do you find anything to be inaccurate?

4 A. I did not.

5 Q. And one of the -- do you see that one of the  
6 material factors listed as having been considered by the  
7 board was the fairness opinions?

8 A. The 1, 2, 3, 4, right?

9 Q. Well, there are -- they carry over onto page  
10 55.

11 A. Okay. I see that, yes.

12 Q. You don't disagree with that, correct?

13 A. No, I think that was one -- one reason, yeah.

14 Q. And the third bullet from the top of page 55  
15 refers to the estimates of accretion-dilution, correct?

16 A. The third from the top?

17 Q. The third from the top of page 55. Third  
18 bullet.

19 A. Yeah, I see the -- I see the bullet point.

20 Q. You don't disagree with that, do you?

21 A. I didn't at the time, no.

22 Q. You don't now?

23 A. Well, I've got a lot more information now.

24 Q. But, I mean, you don't disagree as of this  
25 time?

1 A. No, no.

2 Q. Let me ask you to look at page -- the section  
3 beginning on page 63, which is titled Opinions of Bank  
4 of America's Financial Advisors. Do you see that?

5 A. I do.

6 Q. Did you review that section?

7 A. I did.

8 Q. Did you find anything inaccurate in it?

9 A. No.

10 Q. Let me ask you to look at the exhibit that  
11 begins on page C-1. You see that?

12 A. I don't know how I would find it.

13 MR. CERESNEY: Towards the back.

14 Q. Towards the back. Very -- almost to the end of  
15 the document. It has C-1 at the bottom of the page.

16 A. Oh, I see. Okay, I got it.

17 Q. Did you review C-1 and C-2, which is the  
18 J.C. Flowers opinion letter?

19 A. I read the whole thing. I don't remember this  
20 now, but -- but I read the whole thing, so I would have  
21 read this.

22 Q. Okay. So you read also the FPK opinion letter  
23 attached, right?

24 A. Right.

25 Q. Did you have any discussion with any of the

1 Q. And the third paragraph from the bottom  
2 indicates that Mr. Price updated fourth quarter results  
3 and projected earnings per share, including reasons for  
4 movement of market impacts. Do you see that?

5 A. I do.

6 Q. Did Mr. Price talk about Merrill there?

7 A. I don't recall.

8 Q. On the next page, about the middle of the page  
9 there is an indication that Mr. Price provided a Merrill  
10 Lynch update. Do you see that?

11 A. Right, I do.

12 Q. And by this time, November 21, had Mr. Price  
13 shared with you information relating to the fourth  
14 quarter estimate that he had received on the 12th?

15 A. Again, what I remember is in November he shared  
16 what I think I recall as a \$5 billion loss number, but I  
17 don't recall the -- the specific date.

18 Q. Well, prior to the board meetings in November,  
19 would Mr. Price and you discuss what Mr. Price was going  
20 to convey to the board?

21 A. Usually -- usually he would -- and I think  
22 maybe -- I think always, but I'm not sure, but the  
23 practice was for him to send me his, not his  
24 presentation, but his slides.

25 Q. And what about with respect to the -- the

1 He would just walk to my office and sit down and talk.

2 But I don't recall him doing anything, but it's  
3 possible.

4 Q. His office is close to yours, was close to  
5 yours?

6 A. Next to mine.

7 Q. And after the board call, there's a -- at 11  
8 there's a write-in matter relating to John Thain. Do  
9 you see that?

10 A. Right.

11 Q. What was that relating to?

12 A. This looks to me like a -- it was a meeting  
13 with John Thain, but I don't recall the meeting. The  
14 handwriting is -- is Brenda Meredith's.

15 Q. As of November 21, 2008, did you -- were you  
16 aware that some discussions had been had with  
17 Mr. Mayopoulos and Wachtell relating to disclosure  
18 around losses?

19 A. The meeting that I described that I had in  
20 November where I -- where I learned of a \$5 billion  
21 number, as best I can recollect, was the time that I  
22 also heard that Joe -- well, Joe told me that he had  
23 gone to Tim Mayopoulos and asked if he -- if he thought  
24 that this number would be something that would -- should  
25 be disclosed, and Joe told me that Tim had said he

1 had -- he did not think so. And I don't recall if he  
2 said that before or after he contacted Wachtell Lipton,  
3 but it's my understanding that Tim actually did call  
4 Wachtell Lipton and that there was consensus on the fact  
5 that that was not a disclosable event.

6 Q. Did -- was that discussion you had with  
7 Mr. Price prior to the November 21 board call?

8 A. I don't know how many times I need to say it.  
9 I honestly do not recall when that meeting took place.

10 Q. But it was in November?

11 A. But -- I'm -- I'm almost positive that it was  
12 in November.

13 MR. KRINER: Off the record.

14 THE VIDEOGRAPHER: Going off the record. The  
15 time is 3:02 p.m.

16 (Recess from 3:02 until 3:14 p.m.)

17 THE VIDEOGRAPHER: Back on the record. The  
18 time is 3:14 p.m.

19 BY MR. KRINER:

20 Q. Mr. Lewis, let me ask you to take a look at  
21 your calendar, Exhibit 5 --

22 A. Okay.

23 Q. -- and specifically the column that relates to  
24 December 3rd, 2008, which I believe is page Bates 3724.  
25 That would be the right-hand column, I believe.



1 review the new estimate for the fourth quarter loss.

2 (Lewis Exhibit No. 33 was marked for  
3 identification.)

4 Q. The reporter's handed you Exhibit 33, which is  
5 some e-mail traffic on December 3rd, and it has some  
6 attachments relating to Merrill Lynch. Do you have  
7 that?

8 A. I do.

9 Q. And there's an attachment that begins on page  
10 BAC-ML-DE00018866, and it's titled Merrill Lynch & Co  
11 2008 4Q Pacing & FY Forecast Scenario. Do you see that?

12 A. I do.

13 Q. Did you receive a copy or see a copy of this  
14 document on December 3rd?

15 A. I don't recall specifically if -- if it was  
16 this document, but I did receive a document, and I do  
17 remember, as I mentioned, a \$7 billion after tax loss.

18 Q. And how did the \$7 billion after tax loss  
19 estimate compare with the assumption that you had in  
20 mind for the fourth quarter of '08 for Merrill Lynch at  
21 the time the board approved the transaction?

22 A. It was \$7 billion more of a loss, because  
23 the -- the -- what I was told was that the company was  
24 expecting a break-even quarter.

25 Q. And let me ask you to look at page

1 might want to see that estimate of the fourth quarter  
2 loss for Merrill prior to the stockholder vote?

3 A. I didn't focus on the directors as much as I  
4 focused on Joe coming to me and telling me that he had  
5 gone again to see if there was a need for public  
6 disclosure of that -- of that loss.

7 Q. And so did you personally make a decision about  
8 whether that information should be disclosed?

9 A. No, I was not the decision-maker. The process  
10 called for Joe to be the point person in coordination  
11 with the general counsel, and that was the process we'd  
12 followed for decades.

13 Q. You as a director and chairman of Bank of  
14 America, were you required to accept the advice of  
15 counsel as far as whether disclosure was required or  
16 not?

17 A. I don't know if there's a legal -- a legal  
18 requirement, but I do not have a legal background and I  
19 always thought it was in the best interest of the  
20 shareholders to keep it pure and let your chief  
21 financial officer and general counsel come to an opinion  
22 and then follow that -- and follow that advice.

23 Q. But ultimately the decision is with the  
24 chairman of the board and the directors about what gets  
25 disclosed and what not, right, perhaps based on the

1 advice of counsel, correct?

2 A. It -- yeah, the final say is the directors and  
3 the board -- excuse me -- the board and the chairman,  
4 but it was based on the advice of Joe -- of counsel and  
5 Joe.

6 Q. But the directors, you or any of the other  
7 directors, are not required to accept the advice of  
8 counsel about that disclosure, correct?

9 A. It was -- it was my opinion that was the much  
10 better way to go, and I consciously made a decision that  
11 I should not be involved in the process because I did  
12 not have a legal background.

13 Further, I had been told on several occasions  
14 that securities law is very complicated and that even --  
15 that even good corporate lawyers defer to security  
16 lawyers on -- on the subject.

17 Q. Did you also consciously decide not to give  
18 that decision to the outside directors?

19 A. I don't know when I talked to them. I don't  
20 know -- I don't recall talking about it. I don't know  
21 that I didn't, but just don't remember talking about it.

22 Q. But you didn't take the information to them  
23 before the stockholder vote, correct?

24 A. No, the information was in the hands of Joe  
25 Price, who talked to Tim Mayopoulos, and I was told

## **Exhibit 3**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

Ken Lewis

October 30, 2009

Page 1

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
SECURITIES and EXCHANGE  
COMMISSION,

Plaintiff,

VS.

BANK OF AMERICA,

Defendant.  
-----

VIDEOTAPED DEPOSITION OF KEN LEWIS

New York, New York

Friday, October 30, 2009

Reported by:  
Robert X. Shaw, CSR  
CSR NO. 817  
JOB NO. 304938

Ken Lewis

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1 Ken Lewis

2 over time.

3 Q. Okay.

4 How many mergers or acquisitions  
5 has Bank of America participated in since  
6 you've been CEO?

7 A. Since I've been CEO, we've done  
8 Fleet. We've done U.S. Trust.

9 MBNA. And Merrill Lynch.

10 Q. Countrywide Financial?

11 A. I'm sorry. Countrywide.

12 Q. And what about LaSalle Bank?

13 A. And LaSalle.

14 Q. Okay. Let's take each of those,  
15 and talk about them briefly.

16 When was the Fleet acquisition?

17 A. Fleet was -- gosh, I've forgotten.  
18 Was it 2005?

19 I've actually forgotten the date,  
20 but.

21 Q. Okay.

22 What was Fleet?

23 A. Fleet, it was a bank in the  
24 Northeast.

25 Q. A commercial bank?

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1 Ken Lewis

2 Mr. Curl was also involved in the  
3 negotiations.

4 What was the delegation of duties  
5 as between the two of you?

6 MS. WHITE: This is in the Fleet  
7 transaction?

8 Q. In the Fleet transaction.

9 A. In the Fleet transaction he was,  
10 ah, he was in the background supplying the  
11 information, supplying the different stereotypes  
12 on price, but did not, was not the front  
13 person in this particular one.

14 Q. Okay. You were the front  
15 negotiator in that transaction?

16 A. I was.

17 Q. Okay. And the MBNA deal, what was  
18 your role?

19 A. The MBNA deal was a little less --  
20 we, he and I both got a 'phone call from  
21 Wachtel asking if we would be interested.

22 And Greg was more negotiator there,  
23 and I met one time with Bruce Hammonds, who's  
24 the CEO, but Greg was more the person in that  
25 one.

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2 Q. Well, why did you determine to --

3 Why was Mr. Curl the lead  
4 negotiator on that transaction, as opposed to  
5 the way it had operated with the Fleet  
6 transaction?

7 A. Because Chad Gifford had preferred  
8 it to be that way, and it was much lengthier,  
9 and there were a lot more social terms in  
10 that particular deal than subsequent deals.

11 Q. And Mr. Gifford is who?

12 A. Is the CEO and chairman, was the  
13 CEO and chairman of Fleet.

14 Q. So, you're saying the Fleet  
15 transaction had a lot more social terms, you  
16 said?

17 A. Correct.

18 Q. And it was Mr. Gifford's desire  
19 that you be lead negotiator?

20 A. Correct.

21 Q. What about on the United States  
22 Trust deal, who was the lead negotiator on  
23 that?

24 A. Greg. I got the first 'phone call  
25 from Chuck Schwab, and then, then Greg kind



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2 of took it from there, and it was very small,  
3 and there were no social issues.

4 Q. Okay. And what about the LaSalle  
5 deal?

6 A. LaSalle, Greg did virtually all,  
7 because it was owned by ABN AMRO, a foreign  
8 bank. He had the contacts there, and he did  
9 virtually all of that.

10 Q. And the Countrywide deal?

11 A. Countrywide, it's similar.

12 I had, I had initial contact with  
13 the CEO, but then he took it from there, and  
14 there had been a previous relationship  
15 because we had, we had a preferred stock  
16 investment in the company.

17 Q. On the transactions when Mr. Curl  
18 was leading the negotiations, how would he  
19 keep you apprised of the developments?

20 A. He would either come into my office  
21 and tell me of the developments, or he would  
22 call me, or in some cases he would send  
23 usually a person named David Belk, who would  
24 happen to have some of the financial data.

25 Q. And would he ask for your input?

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2 MR. BLACK: We've marked, as  
3 Exhibit 36, P-36, a document that's  
4 titled "Agreement and Plan of Merger by  
5 and between Merrill Lynch and Co. Inc.  
6 and Bank of America Corporation."

7 (Plaintiff's Exhibit 36, documents  
8 Bates No. 198 to 301, entitled  
9 "Agreement and Plan of Merger by and  
10 between Merrill Lynch & Co. Inc. and  
11 Bank of America Corporation," marked  
12 for identification as of this date.)

13 Q. Mr. Lewis, do you recognize this  
14 document?

15 A. I do.

16 Q. Were you involved in the  
17 negotiation over the actual drafting of the  
18 merger agreement?

19 A. No, I was not.

20 Q. Who was in charge of that?

21 A. Our counsel and Wachtel Lipton.

22 Q. And your counsel was who?

23 A. Tim Mayopoulos, or somebody that he  
24 assigned. I don't know if he did it  
25 personally, or if he assigned somebody.

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2 Q. And did Mr. Curl have any role in  
3 those discussions?

4 A. It's my understanding that he did.

5 Q. What was his role?

6 A. I don't know what -- I think that  
7 there were certain things that he would have  
8 looked at in here, but I would not know which  
9 ones.

10 Q. Is it fair to say Mr. Curl was in  
11 charge of making sure that the negotiated  
12 terms were somehow reflected in the merger  
13 agreement?

14 A. Yes.

15 Q. Can you turn to page, ah, the page  
16 that ends with the number 266, please.

17 A. Yes.

18 Q. Do you recognize your signature  
19 there?

20 A. I do.

21 Q. That's your signature?

22 A. Yes, it is.

23 Q. When did you sign this document?

24 A. Either late Sunday night or early  
25 morning on the 15th, either the Sunday night,

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2 they have, in fact, complied with that?

3 A. I would not be qualified to judge  
4 the quality of that work.

5 I would expect them to, to the  
6 extent that it needs to be reviewed, to have  
7 it reviewed by the right people, and that may  
8 include external counsel.

9 Q. Well, you understand, from the  
10 business perspective, when you entered into  
11 the merger agreement, you understood the key  
12 terms yourself; right?

13 A. Yes.

14 Q. And you understood that those were  
15 the terms that were to be communicated to the  
16 shareholders; correct?

17 A. (Indicating).

18 Q. And so, what did you do to ensure  
19 that those key terms were, in fact,  
20 communicated to shareholders?

21 A. Um, I had great lawyers and great  
22 outside counsel looking at that to see that  
23 the document is prepared correctly.

24 Q. And do you go over the document  
25 with them to ensure that, in fact --

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2 A. No. I would not feel qualified to  
3 go over the document with them. They are the  
4 experts.

5 Q. Well, when you said you wouldn't be  
6 qualified, you're the CEO and chairman of the  
7 company; right?

8 A. Right. But not a lawyer.

9 Q. Fair enough.

10 But you have the ability to  
11 determine whether or not key information is  
12 actually being conveyed to shareholders;  
13 right?

14 A. But I wouldn't know, in totality,  
15 what key information needed to be given to  
16 shareholders, and they would.

17 Q. But on any particular point, you  
18 would have the ability to determine as to  
19 whether or not that point -- for example,  
20 price, you would have the ability to  
21 determine whether the price was communicated  
22 to the shareholders; right?

23 A. Well, I mean, I have a bond of  
24 trust with a finance group, and an accounting  
25 group, and an outside counsel that they have

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2 done that.

3 Q. But that wasn't my question.

4 My question is: You had the  
5 ability to determine whether or not price is  
6 being communicated to the shareholders;  
7 right?

8 A. I would be able to look in there  
9 and see if it was, yes.

10 Q. Okay. So, when you file the proxy  
11 statement, do you, in fact, look at the proxy  
12 statement to determine whether those key  
13 terms that are, in your view, important to  
14 the transaction, are, in fact, related in the  
15 document?

16 A. No. I have the bond of trust with  
17 my legal counsel and my finance group.

18 Q. And in the bond of trust, you have  
19 a discussion with them to discuss whether or  
20 not the key terms are being conveyed?

21 A. No. I have trust that they are  
22 conveying it properly, in totality.

23 Q. So, you have no discussion -- is it  
24 your testimony that when you signed the proxy  
25 statement, you might review segments, but you

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2 A. And, as I mentioned, I was, there's  
3 some confusion on my part between the 5.8 and  
4 the 4.5, but I knew that -- that range, yes.

5 Q. And you did not, at any point in  
6 time, make inquiry as to whether that cap was  
7 going to be disclosed to shareholders?

8 A. No.

9 Q. Did you have any discussions with  
10 anybody before the vote as to whether or not  
11 that information should be disclosed to  
12 shareholders?

13 A. Again, that was not in my  
14 consciousness.

15 Q. The answer is No?

16 A. No.

17 Q. Are you aware that the disclosure  
18 schedule that set forth the cap was not  
19 attached to the merger agreement that was  
20 sent to shareholders?

21 A. No.

22 Q. All right. I'm sorry.

23 It was not attached to the merger  
24 agreement that was included in the proxy  
25 statement that was sent to shareholders?

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2 different times and said he had met with Tim  
3 Mayopoulos, and they had discussed the issue  
4 with, ah, with Wachtel Lipton, and that the,  
5 and that the issue was, should these be in  
6 the disclosure, should these be disclosed,  
7 and Joe said that the, ah, that they said  
8 there was not a disclosable item.

9 Q. Who is the "they" in the "they  
10 said"?

11 A. They, the lawyers.

12 Q. Tim Mayopoulos and Wachtel Lipton?

13 A. Yes, and Wachtel Lipton.

14 Q. And you said Mr. Price came to you  
15 two times?

16 A. Yes.

17 Q. When were the two times?

18 A. I can't recall the time of the  
19 first one, but sometime around this time he  
20 came to me a second time.

21 Q. So, "this time" meaning December  
22 3rd?

23 A. Correct. Sometime around here he  
24 came again and said he had gone through the  
25 same process and that the, ah, the same



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2 answer came back, it was not a disclosable  
3 item.

4 Q. The first time that he came to you,  
5 was that before you had these specific  
6 numbers?

7 A. Um, yes.

8 Q. And was that in November?

9 A. I can't remember.

10 Q. He indicated that the analysis was  
11 -- was the analysis the same?

12 A. Yes.

13 Q. And what factors went into that  
14 analysis?

15 A. I had subsequently learned  
16 probably, I can't remember if I knew then or  
17 not, but there were a number of things that  
18 Tim had done and Wachtel had done, and they  
19 had reviewed the proxy to see if there was  
20 disclosure around volatile instruments that  
21 would be subject to price fluctuations.

22 They had gone back and looked at  
23 the losses that had occurred prior to that,  
24 of that year.

25 And there was the comment about the

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1 Ken Lewis

2 fact that it was generally known in the  
3 marketplace that there is a credit meltdown  
4 going on.

5 I think there was a fourth one, and  
6 I can't remember.

7 Q. Did you have any direct  
8 conversation with Mr. Mayopoulos on this  
9 topic?

10 A. No.

11 Q. Did you have any direct  
12 conversation with Wachtel Lipton?

13 A. Not that I recall.

14 Q. Did you, yourself, express any  
15 position as to whether you thought this  
16 information should be disclosed to  
17 shareholders?

18 A. No. After that extensive ah --  
19 dive into it, I would not think that I would  
20 be qualified to say what was or what was not.

21 Q. During the course of that  
22 discussion, did you have any input as to what  
23 your view was?

24 A. No. He gave me the results of  
25 their analysis.

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2 Q. Okay. Would you describe the  
3 process by which you reviewed parts of the  
4 proxy statement?

5 A. Mainly along the lines of things  
6 that I had an interest in, or had knowledge  
7 of -- for instance, the background.

8 And then, and then the financials,  
9 but not a proofread type review.

10 Q. What else did you do, sir, to  
11 assure yourself that the proxy contained all  
12 the appropriate information?

13 A. We'd been in that processing place  
14 with the lawyers and the accountants to make  
15 sure that everything is in proper form.

16 Q. Now, I want to ask you some  
17 questions about the state of your knowledge  
18 at various points in time.

19 As of December 5th, the date of the  
20 shareholder meeting, do you know whether the  
21 Merrill Lynch comp committee had met to  
22 finalize the pools with respect to bonuses?

23 A. I do not recall that, no.

24 Q. And, sir, do you know ah --

25 Do you know whether you knew, as of

## **Exhibit 4**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

1  
2  
3 UNITED STATES DISTRICT COURT  
4 SOUTHERN DISTRICT OF NEW YORK  
5 Master File No. 09-MD-2058 (PKC)

-----x

6 IN RE BANK OF AMERICA CORP. SECURITIES,  
7 DERIVATIVE AND EMPLOYMENT RETIREMENT  
8 INCOME SECURITY ACT (ERISA) LITIGATION

-----x

9 THIS DOCUMENT RELATES TO  
10 All Securities Actions

-----x

11  
12 IN THE COURT OF CHANCERY  
13 OF THE STATE OF DELAWARE  
14 C.A. No. 4307-CS

-----x

15 IN RE BANK OF AMERICA CORPORATION  
16 STOCKHOLDER DERIVATIVE LITIGATION

-----x

17  
18 December 21, 2011  
19 9:08 a.m.

20 Videotaped Deposition of THOMAS J.  
21 MAY, called as a witness by and on behalf of  
22 the Plaintiffs, pursuant to the applicable  
23 provisions of the Federal Rules of Civil Procedure,  
24 before P. Jodi Ohnemus, RPR, RMR, CRR, CA-CSR #13192,  
25 NH-CSR #91, MA-CSR #12393 and Notary Public, within and  
the Commonwealth of Massachusetts at the Hilton Boston  
Hotel, 89 Broad Street, Boston, Massachusetts.

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1	America board.	10:50:18
2	Those were the essential terms that I	10:50:20
3	recall.	10:50:22
4	Q. And you weren't asked at this meeting to	10:50:28
5	approve the specific merger agreement; is that	10:50:29
6	correct?	10:50:31
7	A. That's correct.	10:50:32
8	Q. Did you ever see the merger agreement for	10:50:33
9	Bank of America's acquisition of Merrill Lynch?	10:50:35
10	A. Yes.	10:50:37
11	Q. And when would you have seen that for the	10:50:37
12	first time, sir?	10:50:39
13	A. I don't recall.	10:50:40
14	Q. Would it have been after it was executed?	10:50:40
15	A. I don't recall.	10:50:46
16	Q. Do you normally review drafts of merger	10:50:47
17	agreements?	10:50:49
18	A. Typically, not. We rely on management.	10:50:50
19	It's something that's delegated to management and	10:50:55
20	its outside law firms and expert law firms.	10:50:59
21	In this case, we -- we had Ed Herlihy and	10:51:02
22	his team that were involved and have done many of	10:51:09
23	these -- many of these transactions.	10:51:15
24	Q. And can you identify Ed Herlihy, please.	10:51:18
25	A. He was our lead attorney at Wachtell	10:51:21

## **Exhibit 5**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
Master File No. 09-MD-2058 (PKC)

-----x

IN RE BANK OF AMERICA CORP. SECURITIES,  
DERIVATIVE AND EMPLOYMENT RETIREMENT  
INCOME SECURITY ACT (ERISA) LITIGATION

-----x

THIS DOCUMENT RELATES TO  
All Securities Actions

-----x

IN THE COURT OF CHANCERY  
OF THE STATE OF DELAWARE  
C.A. No. 4307-CS

-----x

IN RE BANK OF AMERICA CORPORATION  
STOCKHOLDER DERIVATIVE LITIGATION

-----x

December 13, 2011  
9:45 a.m.

Videotaped Deposition of TERESA  
BRENNER, taken by Plaintiffs, pursuant to  
Notice, held at the offices of Bernstein  
Litowitz Berger & Grossmann LLP, 1285  
Avenue of the Americas, New York, New  
York, before Todd DeSimone, a Registered  
Professional Reporter and Notary Public of  
the State of New York.

VERITEXT REPORTING COMPANY

212-267-6868

www.veritext.com

516-608-2400



1 T. BRENNER

2 right, to understand what the terms of the 10:49:54AM  
3 deal are? 10:49:55AM

4 MS. PARK: Objection to the 10:49:56AM  
5 form. 10:49:57AM

6 A. Not necessarily. 10:49:57AM

7 Q. So you can advise the company 10:49:59AM  
8 about its disclosure obligations without 10:50:03AM  
9 knowing the terms of the deal; is that 10:50:05AM  
10 your testimony? 10:50:06AM

11 A. There's a group of people that 10:50:07AM  
12 we rely on to help us evaluate disclosure 10:50:08AM  
13 decisions. We had competent, very 10:50:12AM  
14 competent, external counsel who had helped 10:50:14AM  
15 us do many acquisitions over the years and 10:50:17AM  
16 they assisted us and the internal team 10:50:20AM  
17 with preparing the documents that were 10:50:24AM  
18 required to consummate a merger. 10:50:26AM

19 Q. Did you consider it in any 10:50:27AM  
20 respect part of your responsibility to 10:50:29AM  
21 make sure that the counsel, the external 10:50:31AM  
22 counsel, were doing their jobs 10:50:35AM  
23 appropriately? 10:50:36AM

24 A. I relied on them to do their 10:50:38AM  
25 jobs appropriately. I don't believe I -- 10:50:40AM

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## **Exhibit 6**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

Page 1

\*\*\* C O N F I D E N T I A L \*\*\*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
Master File No. 09-MD-2058 (PKC)

-----x

IN RE BANK OF AMERICA CORP. SECURITIES,  
DERIVATIVE AND EMPLOYMENT RETIREMENT  
INCOME SECURITY ACT (ERISA) LITIGATION

-----x

THIS DOCUMENT RELATES TO  
All Securities Actions

-----x

Volume I

April 5, 2012

1:28 p.m.

Videotaped Deposition of JOE L.  
PRICE, taken by Plaintiffs, pursuant to Notice,  
held at the Charlotte Marriott City Center, 100 West  
Trade Street, Charlotte, North Carolina, before  
Cindy A. Hayden, Registered Merit Reporter,  
Certified Realtime Reporter and Notary Public of  
the State of North Carolina.

1 \*\*\* C O N F I D E N T I A L \*\*\*

2  
3 UNITED STATES DISTRICT COURT  
4 SOUTHERN DISTRICT OF NEW YORK  
5 Master File No. 09-MD-2058 (PKC)

6 -----x

7  
8 IN RE BANK OF AMERICA CORP. SECURITIES,  
9 DERIVATIVE AND EMPLOYMENT RETIREMENT  
10 INCOME SECURITY ACT (ERISA) LITIGATION

11 -----x

12  
13 THIS DOCUMENT RELATES TO  
14 All Securities Actions

15 -----x

16  
17 Volume II

18  
19 April 6, 2012

20  
21 8:33 a.m.

22  
23 Videotaped Deposition of JOE L.  
24 PRICE, taken by Plaintiffs, pursuant to Notice,  
25 held at the Charlotte Marriott City Center, 100 West  
Trade Street, Charlotte, North Carolina, before  
Cindy A. Hayden, Registered Merit Reporter,  
Certified Realtime Reporter and Notary Public of  
the State of North Carolina.

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1	Bank of America's financial --	01:56:49PM
2	MR. LIMAN: Objection to the form.	01:56:50PM
3	MR. JEFFRESS: Objection to form.	01:56:52PM
4	BY MR. CASTALDO:	01:56:53PM
5	Q. -- earnings forecast?	01:56:53PM
6	MR. LIMAN: I take it, Greg, an	01:56:54PM
7	objection from one suffices for all -- to	01:56:57PM
8	preserve the objection for all?	01:57:00PM
9	MR. CASTALDO: That's fine.	01:57:00PM
10	MR. LIMAN: Thanks.	01:57:01PM
11	THE WITNESS: Say that again, I'm	01:57:02PM
12	sorry.	01:57:04PM
13	BY MR. CASTALDO:	01:57:11PM
14	Q. Now, did you believe it was	01:57:11PM
15	important to stay aware of what the consensus	01:57:12PM
16	analyst estimates were for Bank of America in	01:57:16PM
17	your position as CFO?	01:57:20PM
18	MR. LIMAN: Objection to the form.	01:57:21PM
19	THE WITNESS: Look, it was one of	01:57:23PM
20	many things that I was aware of. I don't	01:57:26PM
21	know that I weighed importance one way or	01:57:29PM
22	another. You know, it was one of many.	01:57:32PM
23	BY MR. CASTALDO:	01:57:35PM
24	Q. What was your position with Bank of	01:57:38PM
25	America when Bank of America acquired	01:57:42PM

1 Countrywide Financial? 01:57:43PM

2 A. The -- I was in the CFO role. 01:57:46PM

3 Q. And when was that, sir, if you 01:57:51PM

4 recall? 01:58:02PM

5 A. You know, I don't recall the exact 01:58:02PM

6 dates. We had a -- kind of a -- we had an 01:58:08PM

7 investment in them and then we ultimately had a 01:58:11PM

8 transaction. I'd have to go back to look to get 01:58:14PM

9 the -- you know, the exact dates for you. 01:58:17PM

10 Q. Do you recall Bank of America being 01:58:20PM

11 interested in acquiring Lehman Brothers in 01:58:26PM

12 September of 2008? 01:58:28PM

13 A. Do -- I recall us looking at Lehman 01:58:31PM

14 Brothers. 01:58:38PM

15 Q. And -- and what do you -- do you 01:58:38PM

16 recall the details concerning that potential 01:58:43PM

17 acquisition? 01:58:45PM

18 A. Again, I remember us looking at it. 01:58:48PM

19 It never got to the point of an acquisition. 01:58:50PM

20 Be -- be more specific. You know, I can try to 01:58:54PM

21 be -- be more responsive. I'm sorry. 01:58:57PM

22 Q. How did that interest arise, if you 01:58:58PM

23 recall? 01:59:02PM

24 A. Again, I'm not -- I'm only taking 01:59:02PM

25 exception to your word interest because I think 01:59:05PM

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1 utilized earnings forecasts going forward? 02:41:15PM

2 MR. LIMAN: Objection, foundation. 02:41:19PM

3 THE WITNESS: Just -- just looking 02:41:21PM

4 at the way they did this number on here 02:41:24PM

5 it looks like they showed forward cash 02:41:27PM

6 flows. 02:41:30PM

7 BY MR. CASTALDO: 02:41:31PM

8 Q. Did you have any concerns during 02:41:32PM

9 this weekend, sir, that the analyst estimates 02:41:33PM

10 for Merrill Lynch were not either accurate or 02:41:36PM

11 reliable? 02:41:40PM

12 A. I think my recollection is that 02:41:43PM

13 they, you know, seemed reasonable -- it is -- my 02:41:50PM

14 recollection is they seemed reasonable subject 02:41:53PM

15 to things that were determined in purchase 02:41:56PM

16 accounting, you know, at that -- on that 02:41:59PM

17 weekend, but, again, this was a -- kind of a 02:42:02PM

18 markets-driven business and, you know, that's 02:42:05PM

19 the -- that's the -- kind of the estimate that 02:42:07PM

20 we had from -- or that I -- I recollect having 02:42:09PM

21 in -- from IBES. 02:42:12PM

22 Q. And, sir, during the time that you 02:42:14PM

23 were CFO, approximately how many companies did 02:42:19PM

24 Bank of America acquire? 02:42:23PM

25 A. Two, maybe three. 02:42:26PM

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1 know, that's over on the right-hand side in 05:19:54PM

2 addition to those three. 05:19:55PM

3 Q. And so it was your understanding, 05:19:58PM

4 sir, that as of November 12th -- well, strike 05:20:07PM

5 that. 05:20:14PM

6 You expected, sir, as of November 05:20:14PM

7 12th that Merrill Lynch would lose approximately 05:20:16PM

8 10.9 billion dollars for the fourth quarter of 05:20:19PM

9 2008? 05:20:22PM

10 MR. JEFFRESS: Objection, 05:20:24PM

11 mischaracterizes the testimony. 05:20:25PM

12 THE WITNESS: Yeah. What -- what I 05:20:26PM

13 expected was the forecast showed this 05:20:29PM

14 10.942 tax affected which gave you six 05:20:34PM

15 and a half and there was a tax 05:20:37PM

16 transaction that brought it down to four 05:20:40PM

17 and a half. I -- I expected that was the 05:20:43PM

18 most current forecast that was available 05:20:46PM

19 to me. 05:20:48PM

20 BY MR. CASTALDO: 05:20:49PM

21 Q. And what was your reaction to 05:20:49PM

22 receiving this forecast? 05:20:51PM

23 A. I believe this is the forecast that, 05:20:52PM

24 you know -- or -- you know, forecast or 05:20:56PM

25 knowledge of a forecast that prompted me to ask 05:20:58PM



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1	Mr. -- had to ask Tim Mayopoulos, you know, if	05:21:01PM
2	we had some disclosure -- incremental disclosure	05:21:05PM
3	obligation around it given a proxy.	05:21:09PM
4	Q. And why did this forecast prompt you	05:21:12PM
5	to seek Mr. Mayopoulos's advice on -- on	05:21:14PM
6	disclosure?	05:21:17PM
7	A. I mean, I think -- I thought it was	05:21:21PM
8	prudent to seek his advice.	05:21:22PM
9	Q. And my question was why, sir?	05:21:24PM
10	A. Because there was a loss, you know,	05:21:26PM
11	of this magnitude.	05:21:29PM
12	Q. So it was the mag -- was it the	05:21:30PM
13	magnitude of the loss that --	05:21:32PM
14	A. My -- my -- I don't know about -- I	05:21:36PM
15	thought about it that hard. My recollection is	05:21:38PM
16	I've got a forecast and this was a sizable loss	05:21:40PM
17	and I, you know, thought it prudent to go to Tim	05:21:44PM
18	and ask about it.	05:21:47PM
19	Q. Did you speak to anyone concerning	05:21:48PM
20	this forecast prior to seeking Mr. Mayopoulos's	05:21:52PM
21	advice?	05:21:56PM
22	A. You know, again, I don't have an	05:21:57PM
23	absolute recollection, but I would have received	05:22:04PM
24	it from Neil and had to get an understanding of	05:22:06PM
25	it, you know, from -- from him, so somewhat. I	05:22:08PM

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1           A.    I mean, Tim would have made -- I           06:11:17PM  
2    mean, the -- the way the control mechanisms are       06:11:19PM  
3    set up in the company, you know, he would have       06:11:22PM  
4    made Amy aware, which is where he reported to,       06:11:24PM  
5    and I guess is -- and I would have made Ken           06:11:27PM  
6    aware. You know, I mean, we'd have, you know --       06:11:29PM  
7    in other words, it wouldn't have stopped there       06:11:31PM  
8    if it wasn't following counsel's advice.           06:11:33PM

9           Q.    And you testified, sir, that you           06:11:38PM  
10   ultimately gave Mr. Lewis the details of this       06:11:47PM  
11   decision; is that correct, after November 20th?       06:11:51PM

12           MR. JEFFRESS: Objection to form.           06:11:55PM

13           THE WITNESS: I ultimately informed           06:11:58PM  
14   Ken that based on the work that had been           06:12:03PM  
15   done, you know, that we didn't think that           06:12:05PM  
16   there was any incremental disclosure           06:12:08PM  
17   necessary. That's -- I mean, that's my           06:12:10PM  
18   recollection, yes, sir.           06:12:11PM

19   BY MR. CASTALDO:           06:12:19PM

20           Q.    Did you discuss with Mr. Mayopoulos       06:12:36PM  
21   or Wachtell the possibility that the losses           06:12:39PM  
22   would continue at Merrill Lynch in November and       06:12:42PM  
23   December?           06:12:46PM

24           MR. LIMAN: Objection to the form.           06:12:47PM

25           THE WITNESS: You know, my -- my           06:12:49PM

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1 you know, where they're necessary but not 08:52:32AM  
2 anything of this nature, no, sir. 08:52:34AM  
3 Q. Not in connection with any 08:52:36AM  
4 disclosure issues? 08:52:37AM  
5 A. No, sir. 08:52:38AM  
6 Q. And, Mr. Price -- Price, we briefly 08:52:41AM  
7 discussed yesterday your conversations with 08:52:45AM  
8 Mr. Lewis regarding this decision; do you 08:52:48AM  
9 recall -- do you recall that discussion? 08:52:52AM  
10 A. Yes, sir. 08:52:55AM  
11 Q. Do you remember how soon after the 08:52:56AM  
12 20th you informed Mr. Lewis of this decision? 08:53:00AM  
13 A. No. Ken and I, you know, interacted 08:53:04AM  
14 daily on a number of things and I generally kept 08:53:13AM  
15 him apprised, so I don't remember the exact or 08:53:16AM  
16 the specific -- specific time. 08:53:19AM  
17 Q. And -- and what did you specifically 08:53:20AM  
18 tell Mr. Lewis regarding this decision? 08:53:22AM  
19 A. Again, I don't recollect the exact 08:53:25AM  
20 conversation, but I would have let him know that 08:53:28AM  
21 I called the question, you know, and asked the 08:53:31AM  
22 question and that, you know -- I may have 08:53:34AM  
23 updated him in the interim and said a process 08:53:35AM  
24 was going on but ultimately with the conclusion 08:53:38AM  
25 told him the conclusion that we reached. 08:53:41AM

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1 Q. And did you tell him specifically 08:53:43AM  
2 that you had decided disclosure was not 08:53:47AM  
3 necessary at this time? 08:53:50AM

4 A. Again, as we talked about yesterday, 08:53:53AM  
5 you know, I think this was more of the consensus 08:53:55AM  
6 of the group. I mean, clearly Tim had a 08:53:58AM  
7 recommendation, but, you know, we collectively 08:54:00AM  
8 in the group all thought it made sense and 08:54:02AM  
9 that's what we followed and I followed. I 08:54:05AM  
10 probably conveyed to him more in the context of 08:54:07AM  
11 that was, you know, what the -- what the -- what 08:54:10AM  
12 the process was. 08:54:13AM

13 Q. And do you recall the reasons -- 08:54:15AM  
14 explaining the reasons why the decision was made 08:54:20AM  
15 to Mr. Lewis? 08:54:22AM

16 A. You know, I had -- I don't -- I 08:54:25AM  
17 don't recollect exact conversation. My -- my, 08:54:32AM  
18 again, vague recollection is I would have, you 08:54:35AM  
19 know, kind of just given him the crux of the -- 08:54:37AM  
20 of the answer being that -- you know, the 08:54:40AM  
21 conclusion of the disclosures that were already 08:54:42AM  
22 out there, you know, et cetera. I don't think 08:54:44AM  
23 I'd have taken him through all the details 08:54:45AM  
24 entirely. 08:54:48AM

25 Q. Did you ask Mr. Lewis his opinion 08:54:50AM

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1	others, what that was, and that's my	09:00:56AM
2	recollection of when he -- when we got --	09:00:59AM
3	I think it was Bill McNairy or Bill	09:01:01AM
4	involved.	09:01:03AM
5	BY MR. CASTALDO:	09:01:05AM
6	Q. Are you aware, sir, that Mr. Lewis	09:01:07AM
7	testified in this action that the disclosure	09:01:10AM
8	decision in November 2008 was -- was made by	09:01:13AM
9	you, sir?	09:01:17AM
10	A. I'm trying to remember if I actually	09:01:21AM
11	knew he said those words. I don't know that he	09:01:24AM
12	said those exact words, but I was the one that	09:01:27AM
13	conveyed, you know, our direction to him,	09:01:29AM
14	absolutely.	09:01:32AM
15	Q. What was Mr. Lewis's response during	09:01:34AM
16	your discussion of this issue with him in	09:01:56AM
17	November of 2008?	09:01:59AM
18	A. You know, I don't know -- again, I	09:02:02AM
19	don't remember the exact conversation. I	09:02:06AM
20	don't -- you know, I -- my recollection it	09:02:12AM
21	was -- it was a matter of fact. You know, I	09:02:15AM
22	mean, it was more of this is the process we went	09:02:16AM
23	through, here's the conclusion we reached. As I	09:02:18AM
24	talked about earlier, I don't -- I don't have a	09:02:21AM
25	vivid recollection of any particular response	09:02:23AM

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1           A.    No, I would have gone to our general           11:10:40AM  
2   counsel.   11:10:42AM

3           Q.    And did you discuss this potential           11:10:45AM  
4   disclosure issue with anybody else with respect           11:10:50AM  
5   to the revised forecast received on December           11:10:54AM  
6   3rd, 2008?   11:10:57AM

7           A.    You know, my -- my recollection is I           11:10:58AM  
8   kind of informed Ken of, you know, Tim was still           11:11:03AM  
9   on the same place and it still made sense, but,           11:11:06AM  
10   you know, that -- I think that would have been,           11:11:09AM  
11   you know, kind of the next step for me.                   11:11:12AM

12          Q.    And what specifically did you tell           11:11:14AM  
13   Mr. Lewis?   11:11:15AM

14          A.    Again, I talked to Ken daily on a           11:11:16AM  
15   number of things. My recollection is I just           11:11:19AM  
16   told him, you know, that -- you know, that the           11:11:21AM  
17   conclusion that was reached was the same.                   11:11:24AM

18          Q.    And did you tell Mr. Lewis that you           11:11:29AM  
19   had run the disclosure issue by both                       11:11:32AM  
20   Mr. Mayopoulos and Wachtell Lipton?                       11:11:35AM

21          A.    You know, my recollection is -- is           11:11:37AM  
22   just Tim -- is I would have just said Tim.               11:11:42AM  
23   That's who we would have looked to. I mean,               11:11:45AM  
24   really it's Tim's call on doing otherwise.               11:11:46AM

25          Q.    And what do you mean by that's Tim's           11:11:52AM

## **Exhibit 7**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

John Steele Alphin

November 13, 2009

Page 1

Alphin

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x  
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs. 09-CV-6829

BANK OF AMERICA,

Defendant.  
-----x

JOHN STEELE ALPHIN

New York, New York

Friday, November 13, 2009

Reported by: Steven Neil Cohen, RPR

Job No. 304997



John Steele Alphin

November 13, 2009

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1 Alphin

2 supervisor of yours?

3 A. Was not a supervisor.

4 Q. Now, let's see. You were in human  
5 resources prior to 2001, is that what your  
6 testimony was?

7 A. Human resources -- I started with  
8 the bank. From 1977 until 1980 I actually  
9 worked in the bank as a banker.

10 In 1980 I moved into the HR  
11 function and actually stayed in various HR  
12 functions in the different locations  
13 until -- actually until just a couple of  
14 years ago when it started expanding -- well,  
15 the Fleet merger is when I picked up some  
16 other responsibilities.

17 Q. All right.

18 Then in 2001 what was your title?

19 A. 2001 I would have been the  
20 corporate personnel exec.

21 Q. What is that, is that a global  
22 human resources position?

23 A. Yes.

24 Q. And what did that entail?

25 A. Being responsible for delivering

John Steele Alphin

November 13, 2009

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1 Alphin  
2 all the HR policies, procedures, processes  
3 from hiring to payroll to benefit to comp to  
4 recruiting to the personnel generalist,  
5 consulting advisory role, so a full HR  
6 function, as we probably all would agree.

7 Q. During the period 2001 to 2007  
8 Bank of America made various acquisitions,  
9 correct?

10 A. That is correct.

11 Q. Which acquisitions were those?

12 A. We bought MBNA, Fleet and Merrill  
13 Lynch, are the ones that I can recall.

14 MR. LOWENTHAL: Countrywide.

15 THE WITNESS: Excuse me. Good  
16 heavens, Countrywide.

17 MR. LOWENTHAL: LaSalle.

18 THE WITNESS: LaSalle, right.

19 There have been a lot of them over  
20 33 years. I have to pause and think  
21 about all of them.

22 I actually worked on LaSalle,  
23 actually went to Chicago and worked on  
24 that one a good bit myself.

25 The Countrywide, I did not work on

John Steele Alphin

November 13, 2009

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1 Alphin

2 that personally.

3 BY MR. BLACK:

4 Q. When you say you "worked on it,"  
5 what do you mean by that?

6 A. LaSalle is a good example. I  
7 would go and actually vet through the --  
8 their existing contracts with the associates  
9 and building or selecting the team that was  
10 going to be on the ground in Chicago.

11 Plus looking at all the benefits,  
12 payroll issues and consolidating the  
13 payroll.

14 Q. When you say you didn't work on  
15 it, who performed that function for Bank of  
16 America?

17 A. Countrywide?

18 Q. Yes.

19 A. Two people worked on it a lot  
20 more. I actually sent a gentleman, whose  
21 name is Gary Snyder, who actually relocated  
22 to California.

23 Q. You said two gentlemen. Who else?

24 A. John Harris spent some time on it  
25 also and John Harris is a direct report to

John Steele Alphin

November 13, 2009

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1 Alphin

2 mine and, in essence, has worked on multiple  
3 mergers.

4 Q. What about with respect to the  
5 Fleet transaction?

6 A. Fleet again I worked on that a lot  
7 myself, in Boston a lot myself. Again,  
8 looking at structure, looking at  
9 implementing structure, pay, recruiting and  
10 overall direction of how we are going to  
11 organize that company and put it together.  
12 So I did spend -- spent a good bit of time  
13 there.

14 Q. MBNA?

15 A. MBNA, I spent very little time  
16 because again I asked someone to relocate  
17 and move and they spent more time there than  
18 I did, John Harris being one.

19 Q. Who else?

20 A. And then Katy Morgan, I asked her  
21 to move and she actually moved to Wilmington  
22 to work on the deal.

23 Q. So how did you determine for each  
24 of these transactions whether or not you  
25 were going to be playing a lead role or

John Steele Alphin

November 13, 2009

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1 Alphin

2 A. Yes.

3 Q. How did he know that?

4 A. Because I would have been charged  
5 with that as part of my merger  
6 responsibilities as I had been for the 20  
7 previous years.

8 Q. Well, specifically what was it  
9 that Mr. Lewis would have charged you with  
10 respect to working with Merrill Lynch on the  
11 size of their pool?

12 A. Spending the right amount of money  
13 to keep the key people in the company.

14 Q. It is fair to say that although  
15 you didn't have the ability to make any  
16 final determinations for Merrill Lynch, you  
17 could advise and have some influence over  
18 the final size of the Merrill Lynch pool?

19 MR. LOWENTHAL: Objection to the  
20 form.

21 Go ahead.

22 THE WITNESS: I don't know my  
23 level of success there. I know John --  
24 John ultimately reacted by paying less  
25 than he could have. That is the only

## **Exhibit 8**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

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\*\* C O N F I D E N T I A L \*\*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Master File No. 09-MD-2058 (PKC)

-----x

IN RE BANK OF AMERICA CORP. SECURITIES,  
DERIVATIVE AND EMPLOYMENT RETIREMENT  
INCOME SECURITY ACT (ERISA) LITIGATION

-----x

THIS DOCUMENT RELATES TO  
All Securities Actions

-----x

March 30, 2012

9:05 a.m.

Videotaped Deposition of TIMOTHY  
MAYOPOULOS, taken by Plaintiffs, pursuant  
to Notice, held at the offices of Kaplan  
Fox & Kilsheimer LLP, 850 Third Avenue,  
New York, New York, before Todd DeSimone,  
a Registered Professional Reporter and  
Notary Public of the State of New York.

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1 MAYOPOULOS - CONFIDENTIAL

2 his staff. 09:32:12AM

3 Q. And you were involved in other 09:32:13AM

4 mergers -- you were involved in mergers 09:32:19AM

5 when you were at Bank of America; is that 09:32:23AM

6 correct? 09:32:24AM

7 A. Yes, I was. 09:32:24AM

8 Q. Which ones? 09:32:25AM

9 A. The bank acquired Fleet Boston. 09:32:26AM

10 The deal had already been announced at the 09:32:31AM

11 time I became the general counsel. But I 09:32:33AM

12 was involved in helping to close -- secure 09:32:36AM

13 all the regulatory approvals and close 09:32:39AM

14 that transaction. So Fleet Boston, U.S. 09:32:40AM

15 Trust, Countrywide, Merrill Lynch. I 09:32:44AM

16 think there were a total of six of them. 09:33:01AM

17 Q. LaSalle? 09:33:02AM

18 A. And LaSalle Bank in Chicago. 09:33:03AM

19 Q. In connection with each of them 09:33:06AM

20 you had dealings with the Federal Reserve? 09:33:08AM

21 A. I don't recall whether in each 09:33:11AM

22 and every one I had dealings with the 09:33:13AM

23 Federal Reserve, but typically I would. I 09:33:15AM

24 also had dealings with Mr. Alvarez's 09:33:18AM

25 office in connection with an investment 09:33:22AM

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## **Exhibit 9**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

1  
2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK  
4 Master File No. 09-MD-2058 (PKC)

5 -----x  
6 IN RE BANK OF AMERICA CORP. SECURITIES,  
7 DERIVATIVE AND EMPLOYMENT RETIREMENT  
8 INCOME SECURITY ACT (ERISA) LITIGATION  
9 -----x

10 THIS DOCUMENT RELATES TO  
11 All Securities Actions  
12 -----x

13 IN THE COURT OF CHANCERY  
14 OF THE STATE OF DELAWARE  
15 C.A. No. 4307-CS  
16 -----x

17 IN RE BANK OF AMERICA CORPORATION  
18 STOCKHOLDER DERIVATIVE LITIGATION  
19 -----x

20  
21 Videotaped Deposition of CHARLES GIFFORD,  
22 taken by Plaintiffs, pursuant to Notice, held at the  
23 Hilton Boston Downtown, Financial District, 89 Broad  
24 Street, Boston, Massachusetts 02110, before Lisa M.  
25 Valdario, a Registered Professional Reporter and  
Notary Public in and for the Commonwealth of  
Massachusetts, taken on Thursday, December 8, 2011 at  
9 a.m.

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1	authenticity, I should present a motion to get new	11:25:14
2	management.	11:25:18
3	Q Do you recall if you received any advance	11:25:20
4	materials prior to these weekly meetings?	11:25:23
5	A Rarely. I can't recall any advance materials.	11:25:26
6	Q Do you recall whether or not minutes or notes were	11:25:30
7	kept of these weekly update meetings?	11:25:32
8	A I believe there were minutes but I can't recall	11:25:35
9	exactly what the minutes said. I thought I	11:25:38
10	reviewed some of the minutes yesterday, but I'm	11:25:40
11	not certain if all of them were updated. Some of	11:25:42
12	them were official board minutes. Some of them	11:25:45
13	were updates. Legally, I'm not sure what we're	11:25:47
14	required to do or what was done.	11:25:50
15	Q If you could take a look at the document that I	11:25:53
16	marked as Exhibit, I think 55.	11:25:56
17	A Yup.	11:26:00
18	Q Do you recognize this document?	11:26:01
19	A I recognize it as an email from me to Brian	11:26:03
20	Moynihan.	11:26:07
21	Q And who is Brian Moynihan?	11:26:07
22	A Brian Moynihan was an executive of Bank of	11:26:09
23	America, previous executive at Fleet Boston, and	11:26:11
24	someone for whom I had a great deal of respect.	11:26:15
25	Q And you may have just mentioned this, but what was	11:26:19

1 his position at Bank of America as of the date of 11:26:22  
2 this email? 11:26:25

3 A I can't remember. He had a number of different 11:26:26  
4 positions over a period of five years and I don't 11:26:27  
5 know what it was at this particular time. Brian 11:26:29  
6 was, I might add, might be helpful to you, at 11:26:32  
7 Fleet he was head of mergers and acquisition, and 11:26:36  
8 Fleet did a heck of a lot of mergers and 11:26:41  
9 acquisitions so he's just a like a brain I like to 11:26:43  
10 ask periodically. 11:26:47

11 Q Do you recall why you sent this email, looks like 11:26:49  
12 the morning after the board meeting? 11:26:51

13 A Yes, ma'am. 11:26:54

14 Q And why did you send it? 11:26:54

15 A I don't know why I sent it. I never know why I 11:26:56  
16 send emails. As we get into my other emails, when 11:26:59  
17 I send an email, I don't proofread. I don't ask 11:27:02  
18 myself why I'm sending it. I just send it. 11:27:08

19 Q So say write here, "My issue is process and 11:27:10  
20 prudent time for management and board to review, 11:27:11  
21 especially in a crazed atmosphere." What issue 11:27:12  
22 are you talking about here? 11:27:16

23 A You know, this has come up in previous 11:27:18  
24 depositions, to be candid. For me, as I think 11:27:21  
25 I've testified to you, it was a crazed day for 11:27:27

## **Exhibit 10**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
Master File No. 09-MD-2058 (PKC)

-----X

IN RE BANK OF AMERICA CORP. SECURITIES,  
DERIVATIVE AND EMPLOYMENT RETIREMENT  
INCOME SECURITY ACT (ERISA) LITIGATION

-----X

THIS DOCUMENT RELATES TO  
All Securities Actions

-----X

IN THE COURT OF CHANCERY  
OF THE STATE OF DELAWARE  
C.A. No. 4307-CS

-----X

IN RE BANK OF AMERICA CORPORATION  
STOCKHOLDER DERIVATIVE LITIGATION

-----X

January 22, 2012

9:30 a.m.

Videotaped Deposition of GREGORY  
CURL, taken by Plaintiffs, pursuant to  
Notice, held at the offices of Kaplan Fox  
& Kilsheimer LLP, 850 Third Avenue, New  
York, New York, before Todd DeSimone, a  
Registered Professional Reporter and  
Notary Public of the State of New York.

1

2 Q. Did he give you any details  
3 about the timing of the transaction?

4 A. As I recall, no.

5 Q. And who is Ed Herlihy?

6 A. He is a partner at Wachtell  
7 Lipton.

8 Q. And Wachtell Lipton has  
9 represented Bank of America from time to  
10 time, correct?

11 A. I think for a number of years.

12 Q. And Mr. Fleming, who is he?

13 A. I believe his title was  
14 president, Merrill Lynch.

15 Q. And prior to this time, have  
16 you ever talked to Mr. Fleming?

17 MR. LOWENTHAL: When you say  
18 "this time," you mean September of '08?

19 MS. NAM: Yes, September of  
20 '08.

21 A. Yes.

22 Q. What was the subject matter  
23 that you talked to him about generally?

24 A. He was a calling officer who  
25 called on me for probably 15 years on

1

2 discussions around the verbal agreement  
3 that you had with Mr. Fleming about VICP?

4 A. Not that I -- not that I  
5 recall. I mean, it was just a, you know,  
6 it was at kind of a more -- yeah.

7 Q. I think you can set that aside.

8 Now, going back to the verbal  
9 agreement about the VICP payments, prior  
10 to agreeing to -- strike that.

11 Prior to entering into this  
12 verbal agreement with Mr. Fleming, did you  
13 talk to anyone about that?

14 A. Yes. I had cleared that with  
15 Steele Alphin in HR, that we are going to  
16 put this in the agreement and is this  
17 something that -- as I recall, he was fine  
18 with that, yeah. I'm not an HR person.

19 Q. So you asked for his opinion on  
20 whether this was --

21 A. Well, not only his opinion, his  
22 agreement.

23 Q. And Mr. Steele agreed to that?

24 A. Yes.

25 MR. LOWENTHAL: Mr. Alphin.



1

2 MS. NAM: I'm sorry.

3 A. As I recall, yes, he did.

4 Q. Did you talk to anybody else  
5 regarding this proposal?

6 A. As I recall, no. I don't  
7 recall who he talked to. But I would get  
8 clearance from HR.

9 Q. So did you raise this issue  
10 with Mr. Alphin and he came back to you  
11 with a positive response, or was it --

12 A. I don't recall what it was,  
13 what the time, yeah.

14 Q. And what did you tell  
15 Mr. Alphin?

16 A. Exactly what the agreement was,  
17 yeah.

18 Q. And the agreement was that  
19 Merrill Lynch could pay bonuses up to 2007  
20 levels?

21 A. No, the agreement was that in  
22 the ordinary course, given the governance  
23 and the directors, etc., they could not  
24 pay in excess of that 2007 level.

25 Q. Under your understanding of

1

2 VICP bonus payments?

3 A. As I recall, I'm not an HR -- I  
4 was documenting inside the agreement an  
5 existing comp plan.

6 Q. Did you ever consider linking  
7 performance to Merrill Lynch's ability to  
8 pay VICP bonuses?

9 A. Once again, for the purposes of  
10 the merger agreement, that's why I viewed  
11 this as a business transition issue. That  
12 was a matter that in the ordinary course  
13 would be dealt with by the appropriate  
14 people in HR and compensation people.

15 Q. Did you tell Mr. Lewis about  
16 the verbal agreement that you made with  
17 Mr. Fleming?

18 A. As I recall, I did, yes.

19 Q. When did you tell him about  
20 that?

21 A. I don't recall specifically.

22 Q. Was it before the board  
23 approved or after?

24 A. I don't -- I don't recall.

25 Q. Was it before the merger

1

2 agreement was signed?

3 A. As I recall, it was, yeah.

4 Q. And did Mr. --

5 A. In fact, I know -- I have a --

6 because it was done on Sunday and the

7 merger agreement wasn't signed until

8 later, yeah.

9 Q. And what was your conversation  
10 with Mr. Lewis concerning the agreement  
11 that you made with Mr. Fleming?

12 A. As I recall, I told him that  
13 they had wanted some reference to VICP.  
14 It was in the ordinary course under the  
15 terms of the plan as it was constituted,  
16 and that Steele Alphin, you know, the HR  
17 people, could give him any more details if  
18 he wanted them.

19 Q. Did you tell him that they were  
20 capped at a \$4.5 billion expense?

21 A. I don't recall exactly how I  
22 phrased it.

23 Q. And what was his reaction?

24 A. I don't -- I don't recall.

25 Q. Did you discuss the VICP

# **Exhibit 11**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

C O N F I D E N T I A L

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

09-CV-6829

BANK OF AMERICA CORP.,

Defendant.  
-----

November 16, 2009  
9:39 a.m.

Deposition of NICHOLAS DEMMO, taken by Plaintiff,  
pursuant to Subpoena, held at Securities and  
Exchange Commission, Three World Financial  
Center, New York, New York, before Lisa  
Rosenfeld, a Shorthand Reporter and Notary  
Public within and for the State of New York.

Nicholas Demmo

November 16, 2009

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2 and it also provides information about the  
3 schedules and what they cover. But as far as a  
4 stand-alone list, no, I've never seen that.

5 Q. But does the merger document identify  
6 the contents of the schedule?

7 A. Yes, it identifies you've got  
8 exceptions to the reps and warranties, exceptions  
9 to the negative covenants, and then depending  
10 upon the agreement, there could be other sections  
11 that have specific schedule references.

12 Q. Are you familiar with the corporation  
13 Bank of America?

14 A. Yes.

15 Q. When was the first time that Bank of  
16 America became a client of Wachtell?

17 A. I don't know.

18 Q. When is the first time that you  
19 worked on any matter involving Bank of America?

20 A. I've worked opposite Bank of America  
21 several times. The first time I can recall  
22 working for Bank of America was on -- was summer  
23 of 2005.

24 Q. And prior to September 2008  
25 approximately how many different matters

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November 16, 2009

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2 concerning Bank of America have you worked on?

3 MR. MIRVIS: By that, you mean on  
4 either side?

5 MR. VASILESCU: Yes.

6 Q. No, let's just say representing Bank  
7 of America.

8 A. Well, working backwards, I would say  
9 the Merrill deal. Prior to that we represented  
10 them in the LaSalle transaction. Prior to that  
11 we represented them in the -- when they bought  
12 the second half of Marsico, a fund management  
13 company.

14 Then prior to that was the -- to the  
15 best of my recollection, was the summer of 2005,  
16 which was a company by the name of Works which  
17 was more of a credit card technology management  
18 company.

19 Q. Is there someone at Wachtell who is  
20 the relationship partner with Bank of America?

21 A. Ed Herlihy.

22 Q. While you've been at Wachtell has he  
23 always been the relationship partner with Bank of  
24 America?

25 A. Yes.

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2 their specific needs are. So I'm not sure I  
3 fully understand your question.

4 Q. You mentioned that there was a  
5 business understanding between Bank of America  
6 and Merrill Lynch regarding the VICP?

7 A. Yes.

8 Q. What was that business understanding?

9 A. Well, it boiled down to the VICP  
10 being the same as the prior year, although when I  
11 actually first heard from Greg Curl it was  
12 actually a formula, I forget precisely what it  
13 was but I think it was the expense couldn't be  
14 greater than either of two things. One was the  
15 prior year VICP and the other was the current  
16 year accrual rate on the VICP plus an additional  
17 amount.

18 Q. Now if this was a business agreement,  
19 did you consider putting it in the merger  
20 agreement itself?

21 A. No.

22 Q. Why not?

23 A. It's not something you typically put  
24 in a merger agreement.

25 Q. Why not?



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2 A. Because first of all, the number was  
3 merely permissive, it wasn't necessarily an  
4 amount that was going to be paid out. And if you  
5 told employees there was let's say 5.8 minus the  
6 guarantee \$5 billion as incentive comp available,  
7 people would tend to expect Merrill Lynch to pay  
8 that out when in reality that wasn't necessarily  
9 what they were going to pay that out, and in fact  
10 they didn't pay that out, they paid out  
11 3 billion. So the notion of putting that in  
12 specifically sort of guaranteed the result when  
13 that's not what you were trying to do.

14 Q. But could you put in some language in  
15 the merger agreement that wouldn't cause  
16 employees to expect that they're going to get the  
17 same bonuses the year before, for example, could  
18 you put in some language in the merger agreement  
19 that said that Bank of America and Merrill Lynch  
20 had come to an agreement as to how much money  
21 Merrill Lynch can pay if it wants to in bonuses  
22 before the closure and that that amount is not  
23 disclosed in the merger agreement?

24 A. I mean you could -- obviously you  
25 could put in whatever you want to the merger

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2 agreement, but I've never seen anyone put  
3 anything like that in.

4 Q. But what's your understanding as to  
5 what goes into a merger agreement, is it what  
6 other people have done before or what is material  
7 to the agreement?

8 A. Well, there's two components to it.  
9 The main component is the requirements of both  
10 S-4 and 14a which draws in from other sections of  
11 the law like Reg SK, which has specific detail,  
12 and then obviously there's also the 14a-9 which  
13 talks about material misstatements, and in item  
14 601 that you were pointing to before which talks  
15 about the disclosure schedules, and if there's  
16 anything material to an investment decision there  
17 that's not previously been disclosed.

18 So you're not drawing from prior  
19 disclosures but prior disclosures are obviously  
20 consistent because everyone is following the same  
21 rules.

22 Q. But each deal is somewhat different  
23 from other deals, isn't that right?

24 A. Yes.

25 Q. And I mean other than Bear Stearns,

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2 the S-4, did you consider comparing the VICP  
3 terms up to 2007 levels with whatever  
4 representations BA made to the public regarding  
5 how it was going to undertake cost savings in a  
6 deal?

7 A. I'm not aware of any public  
8 statements about producing incentive  
9 compensation, so that would have, to my  
10 recollection, there would have been nothing to  
11 compare.

12 Q. No, just to the general  
13 representations that it would find \$7 billion in  
14 savings, was there any discussion of that at BA  
15 or Wachtell?

16 A. How they would get to the 7 billion  
17 dollar number?

18 Q. Yes, if the VICP terms related to  
19 that in any way.

20 A. No.

21 Q. Is it fair to say -- strike that.  
22 Were there other compensation issues that were  
23 being negotiated with Merrill Lynch around that  
24 time?

25 MR. LOWENTHAL: Objection to the

Nicholas Demmo

November 16, 2009

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2 form.

3 MR. MIRVIS: What time are we talking  
4 about?

5 Q. In September and October of 2008?

6 A. I don't believe that the disclosure  
7 schedules were finalized until maybe October  
8 22nd, and my recollection is that the last items  
9 that, they weren't being negotiated hotly through  
10 that point, it was more a matter of it took a  
11 while for them to get finished, but I think the  
12 last ones to get finished were the ones related  
13 to compensation matters. Beyond that, I'm not  
14 aware of any September/October comp discussions.

15 MR. VASILESCU: Let's mark as Exhibit  
16 113 an e-mail dated October 1, 2008 from  
17 you to Tim Mayopoulos and several other  
18 people.

19 (Plaintiff's Exhibit 113, e-mail  
20 dated October 1, 2008 from Mr. Demmo to  
21 Tim Mayopoulos and others, was so marked  
22 for identification.)

23 Q. Do you recall if in -- at some point  
24 you learned that there was a discussion regarding  
25 giving Mr. Thain and Mr. Fleming some sort of

## **Exhibit 12**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

-----

IN RE: EXECUTIVE COMPENSATION INVESTIGATION

BANK OF AMERICA - MERRILL LYNCH

-----

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EXAMINATION OF KENNETH LEE LEWIS,  
taken at the State of New York, Office of the  
Attorney General, 120 Broadway, New York, New  
York, on February 26, 2009 at 4:30 p.m., before  
SARA FREUND, a Shorthand Reporter and a Notary  
Public of the State of New York.

1 K.L. Lewis

2 very strongly not to pay them early. I don't  
3 know if they gave consequences like that.

4 MR. CORNGOLD: You didn't tell them to  
5 give consequences like that?

6 THE WITNESS: No.

7 MR. LAWSKY: We had other testimony that  
8 the early payment of the Merrill bonuses was  
9 contemplated back in September when the deal  
10 was struck. Is that false?

11 THE WITNESS: I have no recollection of  
12 time of payment.

13 MR. LAWSKY: Being an issue in the  
14 initial negotiations.

15 THE WITNESS: Right.

16 MR. LAWSKY: Were you involved in those  
17 negotiations?

18 THE WITNESS: No.

19 MR. LAWSKY: Were you involved in the  
20 September negotiations in general?

21 THE WITNESS: Yes.

22 MR. LAWSKY: Were you involved at all in  
23 the negotiations over the bonus provision  
24 with regard to the \$5.8 billion?

25 THE WITNESS: I was not.

U.S. LEGAL SUPPORT, INC.  
1 PENN PLAZA, NEW YORK, NY 10119 Tel: 212-759-6014

## **Exhibit 13**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**



## BANK OF AMERICA CORP /DE/ (BAC)

### 8-K

Current report filing

Filed on 09/18/2008

Filed Period 09/15/2008

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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**  
WASHINGTON, D.C. 20549

**FORM 8-K**  
**CURRENT REPORT**  
**PURSUANT TO SECTION 13 OR 15(d) OF THE**  
**SECURITIES EXCHANGE ACT OF 1934**

Date of Report (Date of earliest event reported):  
**September 18, 2008 (September 15, 2008)**

**BANK OF AMERICA CORPORATION**  
(Exact name of registrant as specified in its charter)

**Delaware**                      **1-6523**                      **56-0906609**  
(State of Incorporation) (Commission File Number) (IRS Employer Identification No.)

**100 North Tryon Street**  
**Charlotte, North Carolina 28255**  
(Address of principal executive offices)

**(800) 299-2265**  
(Registrant's telephone number, including area code)

**Not Applicable**  
(Former name or former address, if changed since last report)

-----  
Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below):

- ☒ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
-

**Item 1.01 Entry into a Material Definitive Agreement.****The Merger Agreement**

On September 15, 2008, Bank of America Corporation ("Bank of America") and Merrill Lynch & Co., Inc. ("Merrill Lynch"), entered into an Agreement and Plan of Merger, dated as of September 15, 2008 (the "Merger Agreement"), pursuant to which a wholly-owned merger subsidiary of Bank of America ("Merger Sub") will, subject to the terms and conditions of the Merger Agreement, merge (the "Merger") with and into Merrill Lynch, with Merrill Lynch continuing as the surviving company and a subsidiary of Bank of America.

Subject to the terms and conditions of the Merger Agreement, which has been approved by the Boards of Directors of both companies, if the Merger is completed, each share of Merrill Lynch common stock will be converted into 0.8595 (the "Exchange Ratio") of a share of Bank of America common stock. Non-convertible preferred stock of Merrill Lynch will be exchanged for preferred stock issued by Bank of America having substantially identical terms. Convertible preferred stock of Merrill Lynch will remain outstanding after the Merger and will thereafter be convertible in accordance with its terms into shares of Bank of America common stock based on the Exchange Ratio. In addition, as of consummation of the Merger, outstanding Merrill Lynch stock options and other stock-based awards will be converted into stock options and other stock-based awards with respect to shares of Bank of America common stock, with adjustments to reflect the Exchange Ratio.

Following the consummation of the Merger, three existing directors of Merrill Lynch will be appointed to newly created directorships on the Board of Directors of Bank of America.

The Merger Agreement, included as Exhibit 2.1, contains (a) customary representations and warranties of Merrill Lynch and Bank of America, including, among others, with respect to: corporate organization, capitalization, corporate authority, third party and governmental consents and approvals, reports and regulatory matters, financial statements, compliance with law and legal proceedings, absence of certain changes, and taxes; and additional customary representations by Merrill Lynch, including, among others, with respect to: employee matters, intellectual property, certain contracts, loan assets, securitizations and its investment advisory business; (b) covenants of Merrill Lynch and Bank of America to conduct their respective businesses in the ordinary course until the Merger is completed; and (c) covenants of Merrill Lynch and Bank of America not to take certain actions during such period. Merrill Lynch has also agreed not to (i) solicit proposals relating to alternative business combination transactions or (ii) subject to certain exceptions, enter into discussions, or enter into any agreement, concerning, or provide confidential information in connection with, any proposals for alternative business combination transactions.

The representations and warranties of each party set forth in the Merger Agreement have been made solely for the benefit of the other party to the Merger Agreement. In addition, such representations and warranties (a) have been qualified by confidential disclosures made to the other party in connection with the Merger Agreement, (b) will not survive consummation of the Merger and cannot be the basis for any claims under the Merger Agreement by the other party after termination of the Merger Agreement except as a result of a knowing breach as of the date of the Merger Agreement, (c) are subject to the materiality standard contained in Section 9.2 of the Merger Agreement which may differ from what may be viewed as material by investors, (d) were made only as of the date of the Merger Agreement or such other date as is specified in the Merger Agreement, and (e) may have been included in the Merger Agreement for the purpose of allocating risk between Bank of America and Merrill Lynch rather than establishing matters as facts. Accordingly, the Merger Agreement is included with this filing only to provide investors with information regarding the terms of the Merger Agreement, and not to provide investors with any other factual information regarding the parties or their respective businesses. The Merger Agreement should not be read alone, but should instead be read in conjunction with the other information regarding the companies and the Merger that will be contained in, or incorporated by reference into, the proxy statement/prospectus that the parties will be filing in connection with the Merger, as well as in the Forms 10-K, Forms 10-Q and other filings that each of Bank of America and Merrill Lynch make with the Securities and Exchange Commission ("SEC").

---

The Board of Directors of Bank of America has adopted a resolution recommending approval of the issuance of Bank of America common stock in the Merger by its stockholders and Bank of America has agreed to submit a proposal for such issuance to its stockholders for consideration. The Board of Directors of Merrill Lynch has adopted a resolution recommending approval of the Merger and adoption by its stockholders and Merrill Lynch has agreed to submit the Merger Agreement to its stockholders for consideration.

Consummation of the Merger is subject to certain customary conditions, including, among others, approval of the stockholders of both Bank of America and Merrill Lynch, governmental filings and regulatory approvals and expiration of applicable waiting periods, accuracy of the representations and warranties of the other party (generally subject to a material adverse effect standard), and material compliance by the other party with its obligations under the Merger Agreement.

The Merger Agreement contains certain termination rights for Merrill Lynch and Bank of America, as the case may be, applicable upon: final, non-appealable denial of required regulatory approvals; the first anniversary of the date of the Merger Agreement if the Merger has not been completed by that time; a breach by the other party that is not or cannot be cured within 30 days' notice of such breach if such breach would result in a failure of the conditions to closing set forth in the Merger Agreement; if either Bank of America's stockholders or Merrill Lynch's stockholders fail to approve the transaction by the required vote; a failure by Bank of America or Merrill Lynch to use reasonable best efforts to obtain the affirmative vote of their respective stockholders; a failure by the Board of Directors of Merrill Lynch to recommend the Merger to its stockholders; or a breach by Merrill Lynch of its obligations in any material respect regarding any alternative business combination proposals.

The foregoing description of the Merger and the Merger Agreement does not purport to be complete and is qualified in its entirety by reference to the Merger Agreement, which is attached hereto as Exhibit 2.1, and is incorporated into this report by reference.

#### **Stock Option Agreement**

In connection with the Merger Agreement, Merrill Lynch has granted to Bank of America an irrevocable option (the "Option") to purchase, under certain circumstances, up to 19.9% of its outstanding common shares at a price, subject to certain adjustments, of \$17.05 per share (the "Stock Option Agreement"). A copy of the Stock Option Agreement is attached as Exhibit 99.1 hereto and is incorporated herein by reference, and the description of the Stock Option Agreement set forth herein is qualified in its entirety by reference to such Exhibit.

#### **Forward-Looking Statements**

This filing contains forward-looking statements, including statements about the financial conditions, results of operations and earnings outlook of Bank of America Corporation. The forward-looking statements involve certain risks and uncertainties. Factors that may cause actual results or earnings to differ materially from such forward-looking statements include, among others, the following: 1) projected business increases following process changes and other investments are lower than expected; 2) competitive pressure among financial services companies increases significantly; 3) general economic conditions are less favorable than expected; 4) political conditions including the threat of future terrorist activity and related actions by the United States abroad may adversely affect the company's businesses and economic conditions as a whole; 5) changes in the interest rate environment and market liquidity reduce interest margins, impact funding sources and effect the ability to originate and distribute financial products in the primary and secondary markets; 6) changes in foreign exchange rates increases exposure; 7) changes in market rates and prices may adversely impact the value of financial products; 8) legislation or regulatory environments, requirements or changes adversely affect the businesses in which the company is engaged; 9) changes in accounting standards, rules or interpretations, 10) litigation liabilities, including costs, expenses, settlements and judgments, may adversely affect the company or its businesses; 11) mergers and acquisitions and their integration into the company; and 12) decisions to downsize, sell or close units or otherwise change the business mix of any of the company. Accordingly, readers are cautioned not to place undue reliance on forward-looking statements,

---

which speak only as of the date on which they are made. Bank of America does not undertake to update forward-looking statements to reflect the impact of circumstances or events that arise after the date the forward-looking statements are made. For further information regarding Bank of America Corporation, please read the Bank of America reports filed with the SEC and available at [www.sec.gov](http://www.sec.gov).

#### **Additional Information About this Transaction**

In connection with the proposed merger, Bank of America will file with the SEC a Registration Statement on Form S-4 that will include a joint proxy statement of Bank of America and Merrill Lynch that also constitutes a prospectus of Bank of America. Bank of America and Merrill Lynch will mail the joint proxy statement/prospectus to their respective stockholders. Bank of America and Merrill Lynch urge investors and security holders to read the joint proxy statement/prospectus regarding the proposed merger when it becomes available because it will contain important information. You may obtain copies of all documents filed with the SEC regarding this transaction, free of charge, at the SEC's website ([www.sec.gov](http://www.sec.gov)). You may also obtain these documents, free of charge, from Bank of America's website ([www.bankofamerica.com](http://www.bankofamerica.com)) under the tab "About Bank of America" and then under the heading "Investor Relations" and then under the item "SEC Filings". You may also obtain these documents, free of charge, from Merrill Lynch's website ([www.ml.com](http://www.ml.com)) under the tab "Investor Relations" and then under the heading "SEC Filings."

#### **Proxy Solicitation**

Bank of America, Merrill Lynch and their respective directors, executive officers and certain other members of management and employees may be soliciting proxies from stockholders in favor of the merger. Information regarding the persons who may, under the rules of the SEC, be considered participants in the solicitation of the stockholders in connection with the proposed merger will be set forth in the joint proxy statement/prospectus when it is filed with the SEC. You can find information about Bank of America's executive officers and directors in its definitive proxy statement filed with the SEC on March 19, 2008. You can find information about Merrill Lynch's executive officers and directors in its definitive proxy statement filed with the SEC on March 14, 2008. You can obtain free copies of these documents from Bank of America and Merrill Lynch using the contact information above.

#### **ITEM 9.01. FINANCIAL STATEMENTS AND EXHIBITS.**

##### **(d) Exhibits.**

The following exhibits are filed herewith:

<u>EXHIBIT NO.</u>	<u>DESCRIPTION OF EXHIBIT</u>
2.1	Agreement and Plan of Merger, dated as of September 15, 2008, by and between Merrill Lynch & Co., Inc. and Bank of America Corporation.
99.1	Stock Option Agreement, dated as of September 15, 2008, by and between Merrill Lynch & Co., Inc. (issuer) and Bank of America Corporation (grantee).

---

**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

**BANK OF AMERICA CORPORATION**

By:   
TERESA M. BRENNER  
Associate General Counsel

Dated: September 18, 2008

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EXHIBIT INDEX

<u>EXHIBIT NO.</u>	<u>DESCRIPTION OF EXHIBIT</u>
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Exhibit 2.1

AGREEMENT AND PLAN OF MERGER

by and between

MERRILL LYNCH & CO., INC.

and

BANK OF AMERICA CORPORATION

\_\_\_\_\_  
DATED AS OF SEPTEMBER 15, 2008

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Exhibit B—Amendment to Surviving Company Certificate of Incorporation

Agency or other Governmental Entity in connection with the transactions contemplated by this Agreement, will not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements therein, in light of the circumstances in which they are made, not misleading. The portions of the Joint Proxy Statement relating to Parent and its Subsidiaries and other portions within the reasonable control of Parent and its Subsidiaries will comply in all material respects with the provisions of the Exchange Act and the rules and regulations thereunder. The Form S-4 will comply in all material respects with the provisions of the Securities Act and the rules and regulations thereunder.

## ARTICLE V

### COVENANTS RELATING TO CONDUCT OF BUSINESS

5.1 Conduct of Businesses Prior to the Effective Time. Except as expressly contemplated by or permitted by this Agreement or with the prior written consent of the other party, during the period from the date of this Agreement to the Effective Time, each of Company and Parent shall, and shall cause each of its respective Subsidiaries to, (a) conduct its business in the ordinary course in all material respects, (b) use reasonable best efforts to maintain and preserve intact its business organization and advantageous business relationships and retain the services of its key officers and key employees and (c) take no action that would reasonably be expected to adversely affect or materially delay the ability of Company, Parent or Merger Sub to obtain any necessary approvals of any Regulatory Agency or other Governmental Entity required for the transactions contemplated hereby or to perform its covenants and agreements under this Agreement or to consummate the transactions contemplated hereby or thereby.

5.2 Company Forbearances. During the period from the date of this Agreement to the Effective Time, except as set forth in this Section 5.2 of the Company Disclosure Schedule or except as expressly contemplated or permitted by this Agreement, Company shall not, and shall not permit any of its Subsidiaries to, without the prior written consent of Parent:

(a) other than in the ordinary course of business consistent with past practice, incur any indebtedness for borrowed money, or assume, guarantee, endorse or otherwise as an accommodation become responsible for the obligations of any other individual, corporation or other entity (it being understood and agreed that incurrence of indebtedness in the ordinary course of business consistent with past practice shall include the creation of deposit liabilities, securitizations, sales of certificates of deposit and entering into repurchase agreements, participation in structured note programs and the rollover of indebtedness for borrowed money outstanding as of the date hereof from time to time as such indebtedness becomes due and payable, in each case in the ordinary course of business consistent with past practice);

(b) (i) adjust, split, combine or reclassify any of its capital stock;

(ii) make, declare or pay any dividend, or make any other distribution on, or directly or indirectly redeem, purchase or otherwise acquire, any shares of its capital stock or any securities or obligations convertible (whether currently convertible or convertible only after the passage of time or the occurrence of certain events) into or exchangeable for any shares of its capital stock (except (A) for regular quarterly cash dividends on the Company Common Stock at

a rate not in excess of \$0.35 per share with record dates and payment dates consistent with the prior year, (B) dividends on the Company Preferred Stock, (C) dividends paid by any of the Subsidiaries of Company to Company or to any of its wholly-owned Subsidiaries, and (D) the acceptance of shares of Company Common Stock in payment of the exercise price or withholding Taxes incurred by any employee or director in connection with the exercise of stock options or stock appreciation rights or the vesting of restricted shares of (or settlement of other equity-based awards in respect of) Company Common Stock granted under a Company Stock Plan, the Company Cap Plan or a Company Deferred Equity Unit Plan, in each case in accordance with past practice and the terms of the applicable the Company Stock Plan, Company Cap Plan and related award agreements or a Company Deferred Equity Unit Plan);

(iii) grant any stock options, stock appreciation rights, restricted shares, restricted stock units, deferred equity units, awards based on the value of Company's capital stock or other equity-based award with respect to shares of Company Common Stock under any of the Company Stock Plans, the Company Cap Plan or any of the Company Deferred Equity Unit Plans or otherwise, or grant any individual, corporation or other entity any right to acquire any shares of its capital stock; or

(iv) issue any additional shares of capital stock or other securities, except pursuant to the exercise of stock options or stock appreciation rights or the settlement of other equity-based awards granted under a Company Stock Plan, the Company Cap Plan or a Company Deferred Equity Unit Plan that are outstanding as of the date of this Agreement;

(c) except as required under applicable law or the terms of any Company Benefit Plan existing as of the date hereof, (i) increase in any manner the compensation or benefits of any of the current or former directors, officers or employees of Company or its Subsidiaries (collectively, "Employees"), (ii) pay any amounts to Employees not required by any current plan or agreement (other than base salary in the ordinary course of business), (iii) become a party to, establish, amend, commence participation in, make any adjustment, terminate or commit itself to the adoption of any stock option plan or other stock-based compensation plan, compensation (including any employee co-investment fund), severance, pension, retirement, profit-sharing, welfare benefit, or other employee benefit plan or agreement or employment agreement with or for the benefit of any Employee (or newly hired employees), (iv) accelerate the vesting of any stock-based compensation or other long-term incentive compensation under any Company Benefit Plans, (v) (x) hire employees in the position of Vice President or above or (y) terminate the employment of any employee in the position of Vice President or above (other than due to terminations for cause) or (vi) take any action which could reasonably be expected to give rise to a "good reason" (or any term of similar import) claim;

(d) sell, transfer, pledge, lease, license, mortgage, encumber or otherwise dispose of any material amount of its properties or assets (including pursuant to securitizations) to any individual, corporation or other entity other than a Subsidiary or cancel, release or assign any material amount of indebtedness to any such person or any material claims held by any such person, in each case other than in the ordinary course of business consistent with past practice or pursuant to contracts in force at the date of this Agreement;

(e) enter into any new line of business or change in any material respect its lending, investment, underwriting, risk and asset liability management and other banking, operating, securitization and servicing policies, except as required by applicable law, regulation or policies imposed by any Governmental Entity;

(f) transfer ownership, or grant any license or other rights, to any person or entity of or in respect of any material Company IP, other than grants of non-exclusive licenses pursuant to License Agreements entered into in the ordinary course of business consistent with past practice;

(g) other than in the ordinary course of business consistent with past practice, make any material investment either by purchase of stock or securities, contributions to capital, property transfers, or purchase of any property or assets of any other individual, corporation or other entity;

(h) take any action, or knowingly fail to take any action, which action or failure to act is reasonably likely to prevent the Merger from qualifying as a reorganization within the meaning of Section 368(a) of the Code;

(i) amend its charter or bylaws, or otherwise take any action to exempt any person or entity (other than Parent or its Subsidiaries) or any action taken by any person or entity from any Takeover Statute or similarly restrictive provisions of its organizational documents or terminate, amend or waive any provisions of any confidentiality or standstill agreements in place with any third parties;

(j) (i) amend or otherwise modify, except in the ordinary course of business, or knowingly violate, in each case in any material respect, the terms of, any Company Contract, or (ii) create, renew or amend any agreement or contract or, except as may be required by applicable law, other binding obligation of Company or its Subsidiaries containing (A) any material restriction on the ability of Company or its Subsidiaries to conduct its business as it is presently being conducted or (B) any material restriction on the ability of Company or its affiliates to engage in any type of activity or business;

(k) commence or settle any material claim, action or proceeding;

(l) take any action or fail to take any action that is intended or may reasonably be expected to result in any of the conditions to the Merger set forth in Article VII not being satisfied;

(m) implement or adopt any material change in its Tax accounting or financial accounting principles, practices or methods, other than as may be required by applicable law, GAAP or regulatory guidelines;

(n) file or amend any material Tax Return, make or change any material Tax election, or settle or compromise any material Tax liability, in each case, other than in the ordinary course of business or as required by law; or

(o) agree to take, make any commitment to take, or adopt any resolutions of its board of directors in support of, any of the actions prohibited by this Section 5.2.

5.3 Parent Forbearances. Except as expressly permitted by this Agreement or with the prior written consent of Company, during the period from the date of this Agreement to the Effective Time, Parent shall not, and shall not permit any of its Subsidiaries to, (a) amend, repeal or otherwise modify any provision of the Parent Certificate or the Parent Bylaws in a manner that would adversely affect Company, the stockholders of Company or the transactions contemplated by this Agreement; (b) take any action, or knowingly fail to take any action, which action or failure to act is reasonably likely to prevent the Merger from qualifying as a "reorganization" within the meaning of Section 368(a) of the Code; (c) take any action or willfully fail to take any action that is intended or may reasonably be expected to result in any of the conditions to the Merger set forth in Article VII not being satisfied; (d) take any action that would be reasonably expected to prevent, materially impede or materially delay the consummation of the transactions contemplated by this Agreement; or (e) agree to take, make any commitment to take, or adopt any resolutions of its board of directors in support of, any of the actions prohibited by this Section 5.3.

## ARTICLE VI

### ADDITIONAL AGREEMENTS

6.1 Regulatory Matters. (a) Parent and Company shall promptly prepare and file with the SEC the Form S-4, in which the Joint Proxy Statement will be included as a prospectus. Each of Parent and Company shall use its reasonable best efforts to have the Form S-4 declared effective under the Securities Act as promptly as practicable after such filing, and Company shall thereafter mail or deliver the Joint Proxy Statement to its stockholders. Parent shall also use its reasonable best efforts to obtain all necessary state securities law or "Blue Sky" permits and approvals required to carry out the transactions contemplated by this Agreement, and Company shall furnish all information concerning Company and the holders of Company Common Stock as may be reasonably requested in connection with any such action.

(b) The parties shall cooperate with each other and use their respective reasonable best efforts to promptly prepare and file all necessary documentation, to effect all applications, notices, petitions and filings, to obtain as promptly as practicable all permits, consents, approvals and authorizations of all third parties (including any unions, works councils or other labor organizations) and Governmental Entities that are necessary or advisable to consummate the transactions contemplated by this Agreement (including the Merger), and to comply with the terms and conditions of all such permits, consents, approvals and authorizations of all such third parties or Governmental Entities. Company and Parent shall have the right to review in advance, and, to the extent practicable, each will consult the other on, in each case subject to applicable laws relating to the confidentiality of information, all the information relating to Company or Parent, as the case may be, and any of their respective Subsidiaries, that appear in any filing made with, or written materials submitted to, any third party or any Governmental Entity in connection with the transactions contemplated by this Agreement. In exercising the foregoing right, each of the parties shall act reasonably and as promptly as practicable. The parties shall consult with each other with respect to the obtaining of all permits, consents, approvals and

IN WITNESS WHEREOF, Company and Parent have caused this Agreement to be executed by their respective officers thereunto duly authorized as of the date first above written.

MERRILL LYNCH & CO., INC.

By: /s/ John A. Thain  
Name: John A. Thain  
Title: Chairman and Chief Executive Officer

BANK OF AMERICA CORPORATION

By: /s/ Kenneth D. Lewis  
Name: Kenneth D. Lewis  
Title: Chairman, Chief Executive Officer and  
President

*Signature Page to Agreement and Plan of Merger*

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## **Exhibit 14**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

## **BANK OF AMERICA CORP /DE/ (BAC)**

### **DEFM14A**

Definitive proxy statement relating to a merger, acquisition, or disposition

Filed on 11/03/2008

THOMSON REUTERS **ACCELUS™**



**THOMSON REUTERS**

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

**SCHEDULE 14A**  
(Rule 14A-101)

Information Required in Proxy Statement  
Schedule 14A Information  
Proxy Statement Pursuant to Section 14(a) of  
the Securities Exchange Act of 1934

Filed by the Registrant ☒

Filed by a Party other than the Registrant ☐

Check the appropriate box:

- ☐ Preliminary Proxy Statement ☐ Confidential, for Use of the Commission Only (as permitted by Rule 14a-6(e)(2))  
☒ Definitive Proxy Statement  
☐ Definitive Additional Materials  
☐ Soliciting Material Pursuant to § 240.14a-12

**Bank of America Corporation**  
(Name of Registrant as Specified In Its Charter)

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

Payment of Filing Fee (Check the appropriate box):

- ☒ No fee required.  
☐ Fee computed on table below per Exchange Act Rules 14a-6(i)(1) and 0-11.

- (1) Title of each class of securities to which transaction applies: \_\_\_\_\_  
(2) Aggregate number of securities to which transaction applies: \_\_\_\_\_  
(3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (Set forth the amount on which the filing fee is calculated and state how it was determined): \_\_\_\_\_  
(4) Proposed maximum aggregate value of transaction: \_\_\_\_\_  
(5) Total fee paid: \_\_\_\_\_

☐ Fee paid previously with preliminary materials.

☐ Check box if any part of the fee is offset as provided by Exchange Act Rule 0-11(a)(2) and identify the filing for which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

- (1) Amount Previously Paid: \_\_\_\_\_  
(2) Form, Schedule or Registration Statement No.: \_\_\_\_\_  
(3) Filing Party: \_\_\_\_\_  
(4) Date Filed: \_\_\_\_\_
- 
- 
-

[Table of Contents](#)**MERGER PROPOSED — YOUR VOTE IS VERY IMPORTANT**

Dear Stockholder:

On September 15, 2008, Merrill Lynch & Co., Inc. and Bank of America Corporation announced a strategic business combination in which a subsidiary of Bank of America will merge with and into Merrill Lynch. If the merger is completed, holders of Merrill Lynch common stock will have a right to receive 0.8595 of a share of Bank of America common stock for each share of Merrill Lynch common stock held immediately prior to the merger. In connection with the merger, Bank of America expects to issue approximately 1.710 billion shares of common stock and 359,100 shares of preferred stock (the terms of which are described starting on page 93).

The market value of the merger consideration will fluctuate with the market price of Bank of America common stock. The following table shows the closing sale prices of Bank of America common stock and Merrill Lynch common stock as reported on the New York Stock Exchange on September 12, 2008, the last trading day before public announcement of the merger, and on October 30, 2008, the last practicable trading day before the distribution of this document. This table also shows the implied value of the merger consideration proposed for each share of Merrill Lynch common stock, which we calculated by multiplying the closing price of Bank of America common stock on those dates by 0.8595, the exchange ratio.

	Bank of America Common Stock	Merrill Lynch Common Stock	Implied Value of One Share of Merrill Lynch Common Stock
At September 12, 2008	\$ 33.74	\$ 17.05	\$ 29.00
At October 30, 2008	\$ 22.78	\$ 17.78	\$ 19.58

The merger is intended to qualify as a "reorganization" within the meaning of Section 368(a) of the Internal Revenue Code of 1986, as amended, and holders of Merrill Lynch common stock are not expected to recognize any gain or loss for United States federal income tax purposes on the exchange of shares of Merrill Lynch common stock for shares of Bank of America common stock in the merger, except with respect to any cash received instead of fractional shares of Bank of America common stock. However, under some circumstances described in this document, the merger will not qualify as a reorganization, and each of us has agreed that in such circumstances we would complete the merger on a taxable basis.

The market prices of both Bank of America common stock and Merrill Lynch common stock will fluctuate before the merger. You should obtain current stock price quotations for Bank of America common stock and Merrill Lynch common stock. Bank of America common stock is quoted on the NYSE under the symbol "BAC." Merrill Lynch common stock is quoted on the NYSE under the symbol "MER."

At a special meeting of Bank of America stockholders, Bank of America stockholders will be asked to vote on the issuance of Bank of America common stock in the merger and certain other matters. The stock issuance proposal requires the votes cast in favor of such proposal to exceed the votes cast against such proposal at the special meeting by holders of Bank of America common stock and 7% Cumulative Redeemable Preferred Stock, Series B, which we refer to as Series B Preferred Stock, voting together without regard to class.

At a special meeting of Merrill Lynch stockholders, Merrill Lynch stockholders will be asked to vote on the adoption of the merger agreement and certain other matters. To adopt the merger agreement and to approve the related certificate amendment requires the affirmative vote of the holders of a majority of the outstanding shares of Merrill Lynch common stock entitled to vote.

Holders of Merrill Lynch preferred stock and holders of depositary shares representing Merrill Lynch preferred stock are not entitled to and are not being requested to vote at the Merrill Lynch special meeting.

**The Bank of America board of directors unanimously recommends that Bank of America stockholders vote FOR the proposal to issue shares of Bank of America common stock in the merger and FOR the other related proposals.**

**The Merrill Lynch board of directors unanimously recommends that Merrill Lynch stockholders vote FOR adoption of the merger agreement and FOR the other related proposals.**

This document describes the special meetings, the merger, the documents related to the merger and other related matters. Please carefully read this entire document, including "Risk Factors" beginning on page 23 for a discussion of the risks relating to the proposed merger. You also can obtain information about our companies from documents that each of us has filed with the Securities and Exchange Commission.

KENNETH D. LEWIS

Chairman, Chief Executive Officer and  
President Bank of America Corporation

JOHN A. THAIN

Chairman and Chief Executive Officer  
Merrill Lynch & Co., Inc.

**Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved the Bank of America common stock or preferred stock to be issued under this document or determined if this document is accurate or adequate. Any representation to the contrary is a criminal offense.**

The date of this document is October 31, 2008, and it is first being mailed or otherwise delivered to Bank of America and Merrill Lynch stockholders on or about November 3, 2008.

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[Table of Contents](#)**THE MERGER AGREEMENT**

*The following describes certain aspects of the merger, including material provisions of the merger agreement. The following description of the merger agreement is subject to, and qualified in its entirety by reference to, the merger agreement, which is attached to this document as Appendix A and is incorporated by reference in this document. We urge you to read the merger agreement carefully and in its entirety, as it is the legal document governing the merger.*

**Terms of the Merger**

Each of the Merrill Lynch board of directors and the Bank of America board of directors has approved the merger agreement, which provides for the merger of Merger Sub with and into Merrill Lynch. Merrill Lynch will be the surviving corporation in the merger and will remain a subsidiary of Bank of America. Each share of Merrill Lynch common stock, par value \$1.331 $\frac{1}{3}$  per share, issued and outstanding immediately prior to the completion of the merger, except for specified shares of Merrill Lynch common stock held by Merrill Lynch and Bank of America, will be converted into the right to receive 0.8595 of a share of Bank of America common stock. If the number of shares of Bank of America common stock changes before the merger is completed because of a reorganization, recapitalization, reclassification, stock dividend, stock split, reverse stock split, or other similar change in capitalization, then an appropriate and proportionate adjustment will be made to the number of shares of Bank of America common stock into which each share of Merrill Lynch common stock will be converted.

Bank of America will not issue any fractional shares of Bank of America common stock in the merger. Instead, a Merrill Lynch stockholder who otherwise would have received a fraction of a share of Bank of America common stock will receive an amount in cash rounded to the nearest cent. This cash amount will be equal to such stockholder's proportionate interest in the net proceeds from the sale in the open market by the exchange agent, on behalf of all such holders, of the aggregate fractional shares of Bank of America common stock that would otherwise have been issued. The sale described in the previous sentence will occur as soon as practicable following the merger.

Non-convertible preferred stock of Merrill Lynch will be converted into preferred stock issued by Bank of America having substantially identical terms except for the additional voting rights described in "The Merger Agreement — Treatment of Preferred Stock," starting on page 77. Convertible preferred stock of Merrill Lynch will remain outstanding after the merger and will thereafter be convertible in accordance with its terms into shares of Bank of America common stock based on the exchange ratio of 0.8595.

Prior to the effective time of the merger, the certificate of incorporation of Merrill Lynch will be amended to reflect changes in the terms of convertible preferred stock of Merrill Lynch described below. The merger agreement provides that Bank of America may change the structure of the merger. No such change will alter the amount or kind of merger consideration to be provided under the merger agreement, adversely affect the tax treatment of Merrill Lynch's stockholders as a result of receiving the merger consideration or the tax treatment of the parties to the merger agreement, or impede or delay completion of the merger.

**Treatment of Merrill Lynch Stock Options and Other Equity-Based Awards**

Each outstanding option to acquire Merrill Lynch common stock granted under Merrill Lynch's stock incentive plans will be converted automatically at the effective time of the merger into an option to purchase Bank of America common stock and will continue to be governed by the terms of the Merrill Lynch stock plan and related grant agreements under which it was granted, except that:

- the number of shares of Bank of America common stock subject to each converted Bank of America stock option will be equal to the product of the number of shares of Merrill Lynch common stock previously subject to the Merrill Lynch stock option and 0.8595, rounded down to the nearest whole share; and
- the exercise price per share of Bank of America common stock subject to each converted Bank of America stock option will be equal to the exercise price for each share of Merrill Lynch common stock



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previously subject to the Merrill Lynch stock option immediately prior to completion of the merger divided by 0.8595, rounded up to the nearest cent.

Restricted shares of Merrill Lynch common stock outstanding immediately prior to the effective time of the merger will be converted automatically at the effective time of the merger into restricted shares of Bank of America common stock. The number of restricted shares of Bank of America common stock will be equal to the product of the number of shares of Merrill Lynch common stock previously subject to the Merrill Lynch restricted share award and 0.8595, rounded to the nearest whole share.

Restricted share units in respect of Merrill Lynch common stock outstanding immediately prior to completion of the merger will be converted automatically at the effective time of the merger into restricted share units in respect of shares of Bank of America common stock. The number of shares of Bank of America common stock subject to each converted restricted share unit will be equal to the product of the number of shares of Merrill Lynch common stock previously subject to the Merrill Lynch restricted share unit and 0.8595, rounded to the nearest whole share. The Bank of America restricted share units will be payable or distributable in accordance with the terms of the Merrill Lynch agreement, plan or arrangement relating to the restricted share units.

Cap units in respect of Merrill Lynch common stock outstanding immediately prior to completion of the merger will be converted automatically at the effective time of the merger into cap units in respect of shares of Bank of America common stock. The number of shares of Bank of America common stock subject to each converted cap unit will be equal to the product of the number of shares of Merrill Lynch common stock previously subject to the Merrill Lynch cap unit and 0.8595, rounded to the nearest whole share. The Bank of America cap units will be payable or distributable in accordance with the terms of the agreement, plan or arrangement relating to the Merrill Lynch restricted share units.

Merrill Lynch deferred equity units, which are amounts denominated in Merrill Lynch common stock and held in participant accounts pursuant to certain of Merrill Lynch's deferred compensation plans, will be converted automatically at the effective time of the merger into deferred equity units in respect of shares of Bank of America common stock. The number of shares of Bank of America common stock subject to each converted deferred equity unit will be equal to the product of the number of shares of Merrill Lynch common stock in which the Merrill Lynch deferred equity unit was previously denominated and 0.8595, rounded to the nearest whole share. The deferred equity units will be payable or distributable in accordance with the terms of the Merrill Lynch deferred compensation plans applicable to the deferred equity units.

Prior to the effective time of the merger, the Merrill Lynch 1986 Employee Stock Purchase Plan will be amended to reflect the merger, including the substitution of Bank of America common stock for Merrill Lynch common stock to effectuate the assumption of the plan. As of immediately after completion of the merger, a maximum of up to 16,449,696 shares of Bank of America common stock (less the number of shares of Company Common Stock issued under the ESPP with respect to any purchase periods ending prior to the Effective Time, multiplied by the Exchange Ratio) will be authorized for issuance to employees of Merrill Lynch and its subsidiaries, following the merger. Bank of America has the right to terminate the plan following the effective time of the merger.

#### **Treatment of Merrill Lynch Preferred Stock**

Upon completion of the merger, (i) each share of Merrill Lynch Preferred Stock Series 1 issued and outstanding immediately prior to completion of the merger will be converted into one share of Bank of America Preferred Stock Series 1, (ii) each share of Merrill Lynch Preferred Stock Series 2 issued and outstanding immediately prior to completion of the merger will be converted into one share of Bank of America Preferred Stock Series 2, (iii) each share of Merrill Lynch Preferred Stock Series 3 issued and outstanding immediately prior to completion of the merger will be converted into one share of Bank of America Preferred Stock Series 3, (iv) each share of Merrill Lynch Preferred Stock Series 4 issued and outstanding immediately prior to completion of the merger will be converted into one share of Bank of America Preferred Stock Series 4, (v) each share of Merrill Lynch Preferred Stock Series 5 issued and outstanding immediately prior to completion of the merger will be converted into one share of Bank of

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America Preferred Stock Series 5, (vi) each share of Merrill Lynch Preferred Stock Series 6 issued and outstanding immediately prior to completion of the merger will be converted into one share of Bank of America Preferred Stock Series 6, (vii) each share of Merrill Lynch Preferred Stock Series 7 issued and outstanding immediately prior to completion of the merger will be converted into one share of Bank of America Preferred Stock Series 7 and (viii) each share of Merrill Lynch Preferred Stock Series 8 issued and outstanding immediately prior to completion of the merger will be converted into one share of Bank of America Preferred Stock Series 8.

The terms of the Bank of America Preferred Stock Series 1, Bank of America Preferred Stock Series 2, Bank of America Preferred Stock Series 3, Bank of America Preferred Stock Series 4, Bank of America Preferred Stock Series 5, Bank of America Preferred Stock Series 6, Bank of America Preferred Stock Series 7, and Bank of America Preferred Stock Series 8 will be substantially identical to the terms of the corresponding series of Merrill Lynch preferred stock, except for the additional voting rights described below. We sometimes refer to the Bank of America Preferred Stock Series 1, Bank of America Preferred Stock Series 2, Bank of America Preferred Stock Series 3, Bank of America Preferred Stock Series 4, Bank of America Preferred Stock Series 5, Bank of America Preferred Stock Series 6, Bank of America Preferred Stock Series 7, and Bank of America Preferred Stock Series 8, collectively, as the New Bank of America Preferred Stock. As of August 29, 2008 (i) 50,000 shares were authorized as Merrill Lynch Preferred Stock Series 1, 21,000 of which were outstanding, (ii) 50,000 shares were authorized as Merrill Lynch Preferred Stock Series 2, 37,000 of which were outstanding, (iii) 43,333 shares were authorized as Merrill Lynch Preferred Stock Series 3, 27,000 of which were outstanding, (iv) 23,333 shares were authorized as Merrill Lynch Preferred Stock Series 4, 20,000 of which were outstanding; (v) 50,000 shares were authorized as Merrill Lynch Preferred Stock Series 5, 50,000 of which were outstanding, (vi) 65,000 shares were authorized as Merrill Lynch Preferred Stock Series 6, 65,000 of which were outstanding, (vii) 50,000 shares were authorized as Merrill Lynch Preferred Stock Series 7, 50,000 of which were outstanding, and (viii) 97,750 shares were authorized as Merrill Lynch Preferred Stock Series 8, 89,100 of which were outstanding.

The holders of Bank of America Preferred Stock Series 1, Bank of America Preferred Stock Series 2, Bank of America Preferred Stock Series 3, Bank of America Preferred Stock Series 4, Bank of America Preferred Stock Series 5 and Bank of America Preferred Stock Series 8 shall be entitled to vote on all matters submitted to a vote of the holders of Bank of America common stock, voting together with the holders of common stock as one class. Each share shall be entitled to 150 votes. The holders of Bank of America Preferred Stock Series 6 and Bank of America Preferred Stock Series 7 shall be entitled to vote on all matters submitted to a vote of the holders of Bank of America common stock, voting together with the holders of common stock as one class. Each share shall be entitled to 5 votes.

Each outstanding share of Merrill Lynch non-convertible preferred stock is presently represented by depositary shares, or Merrill Lynch Depositary Shares, that are listed on the NYSE and represent (a) with respect to the Merrill Lynch Preferred Stock Series 6 and Merrill Lynch Preferred Stock Series 7, a one-fortieth interest in a share of Merrill Lynch preferred stock and (b) with respect to the Merrill Lynch Preferred Stock Series 1, Merrill Lynch Preferred Stock Series 2, Merrill Lynch Preferred Stock Series 3, Merrill Lynch Preferred Stock Series 4, Merrill Lynch Preferred Stock Series 5 and Merrill Lynch Preferred Stock Series 8, a one-twelve hundredth interest in a share of Merrill Lynch preferred stock. Upon completion of the merger, Bank of America will assume the obligations of Merrill Lynch under the (i) Deposit Agreement, dated as of November 1, 2004, among Merrill Lynch, The Bank of New York Mellon (as successor to JPMorgan Chase Bank, N.A.), as depositary, and the Holders from Time to Time of Depositary Receipts (relating to the Merrill Lynch Floating Rate Non-Cumulative Preferred Stock, Series 1), (ii) Deposit Agreement, dated as of March 14, 2005, among Merrill Lynch, The Bank of New York Mellon (as successor to JPMorgan Chase Bank, N.A.), as depositary, and the Holders from Time to Time of Depositary Receipts (relating to the Merrill Lynch Floating Rate Non-Cumulative Preferred Stock, Series 2), (iii) Deposit Agreement, dated as of November 17, 2005, among Merrill Lynch, The Bank of New York Mellon (as successor to JPMorgan Chase Bank, N.A.) and the Holders from Time to Time of Depositary Receipts (relating to the Merrill Lynch 6.375% Non-Cumulative Preferred Stock, Series 3), (iv) Deposit Agreement, dated as of November 17, 2005, among Merrill Lynch, The Bank of New York Mellon (as successor to JPMorgan Chase Bank, N.A.), and the Holders from Time to Time of Depositary Receipts (relating to the Merrill Lynch Floating Rate Non-Cumulative Preferred Stock,

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Series 4), (v) Deposit Agreement, dated as of March 30, 2007, among Merrill Lynch, The Bank of New York Mellon (as successor to The Bank of New York) and the Holders from Time to Time of Depositary Receipts (relating to the Merrill Lynch Floating Rate Non-Cumulative Preferred Stock, Series 5), (vi) Deposit Agreement, dated as of January 28, 2004, among Merrill Lynch (as successor to First Republic Bank), Mellon Investor Services LLC, as depositary, and the Holders from Time to Time of Depositary Receipts (relating to the Merrill Lynch 6.70% Noncumulative Perpetual Preferred Stock, Series 6), (vii) Deposit Agreement, dated as of March 18, 2005, among Merrill Lynch (as successor to First Republic Bank), Mellon Investor Services LLC, as depositary, and the Holders from Time to Time of Depositary Receipts (relating to the Merrill Lynch 6.25% Noncumulative Perpetual Preferred Stock, Series 7) and (viii) Deposit Agreement, dated as of April 29, 2008, among Merrill Lynch, The Bank of New York Mellon (as successor to The Bank of New York) and the Holders from Time to Time of Depositary Receipts (relating to the Merrill Lynch 8.625% Non-Cumulative Preferred Stock, Series 8). Bank of America will instruct the depositaries, each referred to as a Depositary, as depositary under each of the deposit agreements, or Deposit Agreements, to treat the shares of New Bank of America Preferred Stock received by it in exchange for shares of Merrill Lynch preferred stock as newly deposited securities under the applicable Deposit Agreement. In accordance with the terms of the relevant Deposit Agreement, the Merrill Lynch Depositary Shares will thereafter represent the shares of the relevant series of New Bank of America Preferred Stock. Such depositary shares will continue to be listed on the New York Stock Exchange upon completion of the merger under a new name and traded under a new symbol.

Shares of preferred securities issued by Merrill Lynch's subsidiaries will remain issued and outstanding following completion of the merger, and the terms of those preferred shares will generally be unaffected by the merger. Each share of 9.00% Non-Voting Mandatory Convertible Non-Cumulative Preferred Stock, Series 2, and the 9.00% Non-Voting Mandatory Convertible Non-Cumulative Preferred Stock, Series 3, outstanding immediately prior to completion of the merger shall remain issued and outstanding and shall have the rights, privileges, powers and preferences as set forth in Merrill Lynch's certificate of incorporation, as amended by the certificate amendment described herein. Holders of Merrill Lynch preferred stock, Merrill Lynch Depositary Shares or preferred securities issued by Merrill Lynch's subsidiaries are not entitled to vote on the merger or at the special meeting.

EACH DEPOSITARY IS THE ONLY HOLDER OF RECORD OF SHARES OF MERRILL LYNCH PREFERRED STOCK THAT ARE REPRESENTED BY DEPOSITARY SHARES. ALL HOLDERS OF MERRILL LYNCH DEPOSITARY SHARES SHOULD FOLLOW THE INSTRUCTIONS GIVEN TO THEM BY THEIR BROKER.

#### **Treatment of Exchangeable Shares of Merrill Lynch & Co., Canada Ltd**

In accordance with the terms of the merger agreement, Merrill Lynch is obligated to redeem the exchangeable shares in accordance with their terms. The documents governing the exchangeable shares provide that, as a result of the merger being proposed, Merrill Lynch Canada has the right to cause the redemption (or repurchase by an affiliate of Merrill Lynch Canada) of the exchangeable shares in accordance with their terms. Merrill Lynch Canada has determined to exercise its right to redeem the exchangeable shares and its affiliate has determined to exercise its overriding right to purchase the exchangeable shares on the redemption date. The redemption date is the later of the fifth Toronto business day following the date of the special meeting and December 4, 2008.

Upon the repurchase by an affiliate of Merrill Lynch Canada, of the exchangeable shares, holders of such shares will be required to dispose of them in exchange for Merrill Lynch common stock on a one-for-one basis. The holders of exchangeable shares who receive such Merrill Lynch common stock, and continue to hold such Merrill Lynch common stock at the time of the completion of the merger, will subsequently receive the merger consideration in the same manner as other holders of Merrill Lynch common stock. The redemption or repurchase of the exchangeable shares will not, however, be conditional upon the completion of the merger.

Generally, a Canadian resident who holds Merrill Lynch Canada exchangeable shares as capital property and who disposes of them in exchange for Merrill Lynch common stock will realize a capital gain (or capital loss) under the *Income Tax Act* (Canada) equal to the amount by which the fair market value of the

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Merrill Lynch common stock received by the holder, less any reasonable costs of disposition, exceeds (or is less than) the adjusted cost base of the Merrill Lynch Canada exchangeable shares disposed of by the holder.

**This summary is of a general nature and is not comprehensive. It is not intended to be, nor should it be construed to be, legal or tax advice to any particular holder of Merrill Lynch Canada exchangeable shares. Accordingly, holders of Merrill Lynch Canada exchangeable shares will need to consult with their own tax advisors for advice regarding the Canadian income tax consequences to them of the disposition of such shares in exchange for Merrill Lynch common stock and the subsequent receipt of Bank of America common stock upon the merger.**

### **Closing and Effective Time of the Merger**

The merger will be completed only if all of the following occur:

- the merger agreement is adopted by Merrill Lynch stockholders;
- the issuance of shares of Bank of America common stock is approved by the Bank of America stockholders;
- we obtain all required governmental and regulatory consents and approvals; and
- all other conditions to the merger discussed in this document and the merger agreement are either satisfied or waived.

The merger will become effective when a certificate of merger is filed with the Secretary of State of the State of Delaware. However, we may agree to a later time for completion of the merger and specify that time in the certificate of merger in accordance with Delaware law. In the merger agreement, we have agreed to cause the completion of the merger to occur no later than the fifth business day following the satisfaction or waiver of the last of the conditions specified in the merger agreement, or on another mutually agreed date. If these conditions are satisfied or waived during the two weeks immediately prior to the end of a fiscal quarter of Bank of America, then Bank of America may postpone the closing until the first full week after the end of that quarter. It currently is anticipated that the effective time of the merger will occur on or after December 31, 2008, but we cannot guarantee when or if the merger will be completed.

### **Conversion of Shares; Exchange of Certificates; Book-Entry Shares**

The conversion of Merrill Lynch common stock into the right to receive the merger consideration will occur automatically upon completion of the merger. As soon as reasonably practicable after completion of the merger, the exchange agent will exchange certificates representing shares of Merrill Lynch common stock for merger consideration to be received pursuant to the terms of the merger agreement. Prior to the completion of the merger, Bank of America will select a bank or trust company subsidiary of Bank of America or another bank or trust company reasonably acceptable to Merrill Lynch to be the exchange agent, who will exchange certificates representing shares of Merrill Lynch common stock for the merger consideration and perform other duties as explained in the merger agreement.

Shares of Merrill Lynch common stock held in the Direct Registration System (DRS) are being automatically converted into whole shares of Bank of America common stock in DRS form. An account statement will be mailed to you confirming this automatic conversion.

Shares of Merrill Lynch common stock held in the book-entry form will be automatically converted into whole shares of Bank of America common stock in book-entry form. An account statement will be mailed to you confirming this automatic conversion.

### ***Letter of Transmittal***

As soon as reasonably practicable after completion of the merger, the exchange agent will mail a letter of transmittal to each holder of a Merrill Lynch common stock certificate at the effective time of the merger. This mailing will contain instructions on how to surrender Merrill Lynch common stock certificates in

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exchange for statements indicating book-entry ownership of Bank of America common stock and a check in the amount of cash to be paid instead of fractional shares. If a holder of a Merrill Lynch common stock certificate makes a special request, however, Bank of America will issue to the requesting holder a Bank of America stock certificate in lieu of book-entry shares. When you deliver your Merrill Lynch stock certificates to the exchange agent along with a properly executed letter of transmittal and any other required documents, your Merrill Lynch stock certificates will be cancelled and you will receive statements indicating book-entry ownership of Bank of America common stock, or, if requested, stock certificates representing the number of full shares of Bank of America common stock to which you are entitled under the merger agreement. You also will receive a cash payment for any fractional shares of Bank of America common stock that would have been otherwise issuable to you as a result of the merger.

Holders of Merrill Lynch common stock should not submit their Merrill Lynch stock certificates for exchange until they receive the transmittal instructions and a form of letter of transmittal from the exchange agent.

If a certificate for Merrill Lynch common stock has been lost, stolen or destroyed, the exchange agent will issue the consideration properly payable under the merger agreement upon receipt of appropriate evidence as to that loss, theft or destruction and appropriate and customary indemnification.

After completion of the merger, there will be no further transfers on the stock transfer books of Merrill Lynch, except as required to settle trades executed prior to completion of the merger.

***Withholding***

The exchange agent will be entitled to deduct and withhold from the cash in lieu of fractional shares payable to any Merrill Lynch stockholder the amounts it is required to deduct and withhold under any federal, state, local or foreign tax law. If the exchange agent withholds any amounts, these amounts will be treated for all purposes of the merger as having been paid to the stockholders from whom they were withheld.

***Dividends and Distributions***

Until Merrill Lynch common stock certificates are surrendered for exchange, any dividends or other distributions declared after the completion of the merger with respect to Bank of America common stock into which shares of Merrill Lynch common stock may have been converted will accrue, without interest, but will not be paid. Bank of America will pay to former Merrill Lynch stockholders any unpaid dividends or other distributions, without interest, only after they have duly surrendered their Merrill Lynch stock certificates.

Prior to the effective time of the merger, Merrill Lynch and its subsidiaries may not make, declare or pay any dividend or distribution on its capital stock or repurchase any shares of its capital stock, other than:

- regular quarterly cash dividends on Merrill Lynch common stock at a rate not to exceed \$0.35 per share of Merrill Lynch common stock with record dates and payment dates consistent with the prior year;
- dividends on Merrill Lynch's preferred stock;
- dividends paid by any subsidiary of Merrill Lynch to Merrill Lynch or to any of its wholly owned subsidiaries; or
- the acceptance of shares of Merrill Lynch common stock in payment of the exercise of a stock option or stock appreciation rights or the vesting of restricted shares of (or settlement of other equity-based awards in respect of) Merrill Lynch common stock granted under a Merrill Lynch stock plan, financial advisor capital accumulation award plan or deferred equity unit plan, in each case in accordance with past practice and the terms of the applicable plan.

Merrill Lynch and Bank of America have agreed to coordinate declaration of dividends so that holders of Merrill Lynch common stock will not receive two dividends, or fail to receive one dividend, for any quarter with respect to their Merrill Lynch common stock and any Bank of America common stock any holder receives in the merger.



Table of Contents**Representations and Warranties**

The merger agreement contains customary representations and warranties of Merrill Lynch and Bank of America relating to their respective businesses. With the exception of certain representations that must be true and correct in all material respects (or, in the case of specific representations and warranties regarding the capitalization of Merrill Lynch, true and correct except to a de minimis extent), no representation or warranty will be deemed untrue, inaccurate or incorrect as a consequence of the existence or absence of any fact, circumstance or event unless that fact, circumstance or event, individually or when taken together with all other facts, circumstances or events, has had or would reasonably be expected to have a material adverse effect on the company making the representation. In determining whether a material adverse effect has occurred or would reasonably be expected to occur, the parties will disregard any effects resulting from (1) changes in generally accepted accounting principles or regulatory accounting requirements applicable generally to companies in the industries in which the relevant party and its subsidiaries operate (except to the extent that the effects of such a change are disproportionately adverse to such party as compared to other companies in such industries), (2) changes in laws, rules or regulations or the interpretation of laws, rules or regulations by governmental authorities of general applicability to companies in the industries in which the relevant party and its subsidiaries operate (except to the extent that the effects of such a change are disproportionately adverse to such party as compared to other companies in such industries), (3) actions or omissions taken with the prior written consent of the other party or expressly required by the merger agreement, (4) changes in global, national or regional political conditions (including acts of terrorism or war) or in general business, economic or market conditions, including changes generally in prevailing interest rates, currency exchange rates, credit markets and price levels or trading volumes in the United States or foreign securities markets, in each case, generally affecting the industries in which the relevant party or its subsidiaries operate and including changes to any previously correctly applied asset marks resulting therefrom (except to the extent that the effects of such a change are disproportionately adverse to such party as compared to other companies in such industries), (5) the execution of the merger agreement or public disclosure of the merger or the transactions contemplated by the merger agreement, including acts of competitors or losses of employees to the extent resulting therefrom, (6) failure to meet earning projections in and of itself, but not including any underlying causes thereof, or (7) changes in the trading price of either party's common stock in and of itself, but not including any underlying causes thereof. The representations and warranties in the merger agreement do not survive the completion of the merger.

Each of Bank of America and Merrill Lynch has made representations and warranties to the other regarding, among other things:

- corporate matters, including due organization and qualification;
- capitalization;
- authority relative to execution and delivery of the merger agreement and the stock option agreement and the absence of conflicts with, or violations of, organizational documents or other obligations as a result of the merger;
- required governmental filings and consents;
- the timely filing of reports with governmental entities, and the absence of investigations and enforcement actions by regulatory agencies;
- financial statements, internal controls and accounting or auditing practices;
- broker's fees payable in connection with the merger;
- the absence of material adverse changes;
- conduct of business in the ordinary course of business since June 27, 2008;
- legal proceedings;
- taxes and tax returns;

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- material contracts;
- risk management instruments and derivatives;
- compliance with applicable laws;
- tax treatment of the merger;
- the receipt of financial advisors' opinions;
- intellectual property; and
- the accuracy of information supplied for inclusion in this document and other similar documents.

In addition, Merrill Lynch has made other representations and warranties about itself to Bank of America as to:

- employee matters, including employee benefit plans;
- investment securities and commodities;
- owned and leased real property;
- environmental liabilities;
- broker dealer, fund and investment advisory matters;
- securitizations;
- the inapplicability of state takeover laws; and
- interested party transactions.

The representations and warranties described above and included in the merger agreement were made by each of Bank of America and Merrill Lynch to the other. These representations and warranties were made as of specific dates, may be subject to important qualifications and limitations agreed to by Bank of America and Merrill Lynch in connection with negotiating the terms of the merger agreement, and may have been included in the merger agreement for the purpose of allocating risk between Bank of America and Merrill Lynch rather than to establish matters as facts. The merger agreement is described in, and included as an appendix to, this document only to provide you with information regarding its terms and conditions, and not to provide any other factual information regarding Merrill Lynch, Bank of America or their respective businesses. Accordingly, the representations and warranties and other provisions of the merger agreement should not be read alone, but instead should be read only in conjunction with the information provided elsewhere in this document and in the documents incorporated by reference into this document. See "Where You Can Find More Information" on page 123.

### **Covenants and Agreements**

Each of Merrill Lynch and Bank of America has undertaken customary covenants that place restrictions on it and its subsidiaries until completion of the merger. In general, each of Bank of America and Merrill Lynch agreed to (1) conduct its business in the ordinary course in all material respects, (2) use reasonable best efforts to maintain and preserve intact its business organization and advantageous business relationships, including retaining the services of key officers and employees, and (3) take no action that would reasonably be expected to adversely affect or materially delay its ability to obtain any necessary regulatory and governmental approvals, perform its covenants or complete the merger. Merrill Lynch further agreed that, with certain exceptions or except with Bank of America's prior written consent (which consent will not be unreasonably withheld or delayed with respect to certain of the actions described below), Merrill Lynch will not, and will not permit any of its subsidiaries to, among other things, undertake the following extraordinary actions:

- incur indebtedness or in any way assume the indebtedness of another person, except in the ordinary course of business consistent with past practice;

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- adjust, split, combine or reclassify any of its capital stock;
- make, declare or pay any dividends or other distributions on any shares of its capital stock, or redeem, purchase or otherwise acquire any shares of its capital stock, except as set forth above in "— Conversion of Shares; Exchange of Certificates — Dividends and Distributions" (Bank of America has agreed to allow Merrill Lynch to repurchase shares of Merrill Lynch common stock in connection with the issuance of shares under Merrill Lynch's stock incentive, financial advisor capital accumulation award plan, and deferred equity unit plans);
- issue or grant shares, stock options, stock appreciation rights, restricted shares, restricted stock units, deferred equity units, awards based on the value of Merrill Lynch's capital stock or other equity-based awards outside the parameters set forth in the merger agreement;
- except as required under applicable law or the terms of any Merrill Lynch benefit plan, (i) increase the compensation or benefits of any current or former directors, officers or employees; (ii) pay any current or former directors, officers or employees any amounts not required by existing plans or agreements; (iii) become a party to, establish, adjust, or terminate any employee benefit or compensation plan or agreement; (iv) accelerate the vesting of any stock-based compensation or other long-term incentive compensation under any of Merrill Lynch's employee benefit plans; (v) hire employees in the position of vice president or above or terminate (other than for cause) the employment of employees in the position of vice president or above; or (vi) take any action which could reasonably be expected to give rise to a "good reason" claim;
- other than in the ordinary course of business, consistent with past practice or pursuant to contracts in force as of September 15, 2008, sell, transfer, pledge, lease, license, mortgage, encumber or otherwise dispose of any material assets or properties or cancel, release or assign any material indebtedness;
- enter into any new line of business or change in any material respect its lending, investment, underwriting, risk and asset liability management and other banking, operating, securitization and servicing policies other than as required by applicable law, regulation or policies imposed by any governmental entity;
- transfer ownership or grant rights to its material intellectual property, except for certain grants of licenses in the ordinary course of business consistent with past practice;
- make any material investment either by purchase of securities, capital contributions, property transfers or purchase of property or assets other than in the ordinary course of business consistent with past practice;
- take any action or knowingly fail to take any action, which action or failure to act is reasonably likely to prevent the merger from qualifying as a reorganization within the meaning of Section 368(a) of the Code;
- amend its charter and bylaws or otherwise take any action to exempt another person from any applicable takeover law or defensive charter or terminate, amend or waive any provisions of any confidentiality or standstill agreements in place with any third parties;
- amend or knowingly violate certain material contracts or enter into any obligation that would impose material restrictions on the business of Merrill Lynch, its subsidiaries or its affiliates;
- commence or settle any material claim, action or proceeding;
- take or fail to take any action that is intended, or may reasonably be expected to, result in any of the conditions to the merger to fail to be satisfied;
- implement or adopt any material change in its tax accounting or financial accounting principles, practices or methods, except as required by applicable law, generally accepted accounting principles or regulatory guidelines;



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- file or amend any material tax return, make or change any material tax election or settle or compromise any material tax liability, in each case, other than in the ordinary course of business or as required by law; or
- agree to take or adopt any resolutions by the board of directors in support of any of the actions prohibited by the preceding bullets.

As discussed under "Recent Developments", Bank of America and Merrill Lynch have agreed to grant such waivers or amendments to the merger agreement as may be required to permit the CPP investment, including the granting of waivers to the covenants concerning the issuance of capital stock, the amendment of Merrill Lynch's charter for the creation of preferred stock to be issued to the U.S. Treasury pursuant to the CPP and the merger qualifying as a reorganization under Section 368(a) of the Code.

Bank of America agrees that, except as permitted by the merger agreement or with Merrill Lynch's prior written consent, Bank of America will not, among other things, undertake the following extraordinary actions:

- amend any governing documents in a manner that would adversely affect Merrill Lynch or its stockholders or the transactions contemplated by the merger agreement;
- take any action or knowingly fail to take any action reasonably likely to prevent the merger from qualifying as a reorganization within the meaning of Section 368(a) of the Code;
- take any action or willfully fail to take any action that is intended, or may be reasonably expected, to result in any of the conditions to the merger failing to be satisfied;
- take any action that would reasonably be expected to prevent, materially impede or materially delay completion of the merger; or
- agree to take or adopt any resolutions by the board of directors in support of any of the actions prohibited by the preceding bullets.

The merger agreement also contains covenants relating to the preparation of this document and the holding of the special meetings of Merrill Lynch and Bank of America stockholders, access to information of the other company and public announcements with respect to the transactions contemplated by the merger agreement. Merrill Lynch has agreed to consult with Bank of America regarding certain tax planning matters. Bank of America has also agreed to cause the shares of Bank of America common stock issued in the merger to be approved for listing on the NYSE.

In addition, the merger agreement contains a covenant that Merrill Lynch shall take all action necessary to redeem the exchangeable shares which were issued by Merrill Lynch Canada in connection with the merger with Midland Walwyn Inc., prior to completion of the merger.

#### **Reasonable Best Efforts of Merrill Lynch and Bank of America to Obtain the Required Stockholder Vote**

Merrill Lynch has agreed to use its reasonable best efforts to hold a meeting of its stockholders as soon as is reasonably practicable for the purpose of Merrill Lynch stockholders voting on the adoption of the merger agreement. Merrill Lynch will use its reasonable best efforts to obtain such stockholder approval. The merger agreement requires Merrill Lynch to submit the merger agreement to a stockholder vote even if its board of directors no longer recommends adoption of the merger agreement. The board of directors of Merrill Lynch has unanimously approved the merger and adopted resolutions directing that the merger be submitted to the Merrill Lynch stockholders for their consideration.

Bank of America has also agreed to use its reasonable best efforts to hold a meeting of its stockholders as soon as is reasonably practicable and to use its reasonable best efforts to obtain stockholder approval of the issuance of shares of Bank of America common stock to Merrill Lynch stockholders in the merger. The merger agreement requires Bank of America to submit the proposal to issue shares of common stock to a stockholder vote even if its board of directors no longer recommends such proposal. The board of directors of Bank of America has unanimously approved the merger and has adopted resolutions directing that the issuance of the common stock be submitted to Bank of America stockholders for their consideration.

Table of Contents**Agreement Not to Solicit Other Offers**

Merrill Lynch also has agreed that it, its subsidiaries and their officers, directors, employees, agents and representatives will not, directly or indirectly:

- initiate, solicit, encourage or facilitate (including by way of furnishing information) any inquiries or proposals for any "Alternative Proposal" (as defined below); or
- participate in any discussions or negotiations, or enter into any agreement, regarding any "Alternative Transaction" (as defined below).

However, prior to the special meeting of Merrill Lynch stockholders, Merrill Lynch may consider and participate in discussions and negotiations with respect to a bona fide Alternative Proposal, and furnish information in connection therewith, if it has first entered into a confidentiality agreement with a party proposing the Alternative Proposal on terms substantially similar to, and no less favorable to Merrill Lynch than, Merrill Lynch's confidentiality agreement with Bank of America and the Merrill Lynch board of directors determines in good faith (after consultation with outside legal counsel) that failure to take these actions would cause the board to violate its fiduciary duties to Merrill Lynch stockholders under applicable law.

Merrill Lynch has agreed in the merger agreement:

- to cease any existing discussions or negotiations with respect to any Alternative Proposal conducted prior to execution of the merger agreement, and to use reasonable best efforts to cause all persons other than Bank of America who have been furnished with confidential information in connection with an Alternative Proposal within the 12 months prior to the date of the merger agreement to return or destroy such information;
- to notify Bank of America promptly (but no later than 24 hours) after it receives any Alternative Proposal, or any material change to any Alternative Proposal, or any request for nonpublic information relating to Merrill Lynch or any of its subsidiaries or access to Merrill Lynch's properties, books or records, and to provide Bank of America with relevant information regarding the Alternative Proposal or such request; and
- to use its best efforts to keep Bank of America fully informed, on a current basis, of any material changes in the status and any material changes in the terms of any such Alternative Proposal.

As used in the merger agreement, an "Alternative Proposal" means any inquiry or proposal, including any indication of an intention to make a proposal, regarding any merger, share exchange, consolidation, sale of assets, sale of shares of capital stock (including by way of a tender offer) or similar transactions involving Merrill Lynch or any of its subsidiaries that, if completed, would constitute an Alternative Transaction.

As used in the merger agreement, "Alternative Transaction" means any of the following:

- a transaction in which any person or group (other than Bank of America or its affiliates), directly or indirectly, acquires or would acquire more than 15% of the outstanding shares of Merrill Lynch or any of its subsidiaries or outstanding voting power or of any new series or new class of Merrill Lynch preferred stock that would be entitled to a class or series vote with respect to a merger with Merrill Lynch or any of its subsidiaries, whether from Merrill Lynch or pursuant to a tender offer or exchange offer or otherwise;
- a merger, share exchange, consolidation or other business combination involving Merrill Lynch or any of its subsidiaries (other than the merger being described here);
- any transaction in which any person or group (other than Bank of America or its affiliates) acquires or would acquire control of assets (including, for this purpose, the outstanding equity securities of subsidiaries of Merrill Lynch and securities of the entity surviving any merger or business combination including any of Merrill Lynch's subsidiaries) of Merrill Lynch or any of its subsidiaries representing more than 15% of the fair market value of all the assets, net revenues or net income of Merrill Lynch and its subsidiaries, taken as a whole, immediately prior to such transaction; or

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- any other consolidation, business combination, recapitalization or similar transaction involving Merrill Lynch or any of its subsidiaries, other than the transactions contemplated by the merger agreement.

The Merrill Lynch board of directors has unanimously adopted a resolution recommending that the Merrill Lynch stockholders adopt the merger agreement. Under the merger agreement, except as provided in the paragraph below, the Merrill Lynch board of directors may not withdraw, modify or qualify, or propose publicly to withdraw, modify or qualify, its recommendation, take any public action or make any public statement in connection with the meeting of Merrill Lynch stockholders that is substantively inconsistent with its recommendation, or approve or recommend, or publicly propose to approve or recommend, or fail to recommend against, any Alternative Proposal. Any of these actions is referred to as a "Change of Recommendation."

The Merrill Lynch board of directors may make a Change of Recommendation if the board receives an unsolicited Alternative Proposal that constitutes a Superior Proposal (as defined below) and that Superior Proposal has not been withdrawn, the board determines in good faith (after consultation with outside legal counsel) that, in light of such Superior Proposal, the failure to effect such Change of Recommendation would cause it to violate its fiduciary duties to Merrill Lynch stockholders under applicable law and Merrill Lynch complies with certain notice and negotiation requirements.

As used in the merger agreement, "Superior Proposal" means any third party proposal to acquire all of Merrill Lynch's equity or assets, net revenues or net income of Merrill Lynch and its subsidiaries, that Merrill Lynch's board of directors determines in reasonable good faith judgment, after consultation with its financial advisor and outside counsel, would be more favorable, from a financial point of view, to the Merrill Lynch stockholders than the transactions contemplated by the merger agreement and is reasonably capable of being completed.

### **Employee Matters**

Bank of America has agreed, from completion of the merger through December 31, 2009, to maintain employee benefit plans and compensation opportunities for the benefit of individuals who are, on the closing date of the merger, actively employed by Merrill Lynch and its subsidiaries that are substantially comparable, in the aggregate, to those made available to those employees immediately prior to completion of the merger.

In addition, Bank of America has agreed, to the extent any Merrill Lynch employee becomes eligible to participate in Bank of America benefit plans following the merger:

- to recognize each employee's service with Merrill Lynch prior to completion of the merger for purposes of eligibility, participation, vesting and, except under defined benefit pension plans, benefit accrual, in each case under the Bank of America plans to the same extent such service was recognized under comparable Merrill Lynch plans prior to completion of the merger; and
- to use reasonable best efforts to waive any exclusion for pre-existing conditions or eligibility waiting periods under any Bank of America health, dental, vision or other welfare plans, to the extent such limitation would have been waived or satisfied under a corresponding Merrill Lynch plan in which such employee participated immediately prior to completion of the merger, and recognize any health, dental or vision expenses incurred in the year in which the merger closes (or, if later, the year in which such employee is first eligible to participate) for purposes of applicable deductible and annual out-of-pocket expense requirements under any health, dental or vision plan of Bank of America.

### **Indemnification and Insurance**

The merger agreement requires the current rights of the directors and officers of Merrill Lynch and its subsidiaries to indemnification under these entities' organizational documents and other disclosed agreements to continue in effect for six years after completion of the merger. The merger agreement also provides that, upon completion of the merger, Bank of America will cause the surviving corporation to indemnify, defend and hold harmless, and provide advancement of expenses to, all past and present officers and directors of

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Merrill Lynch and its subsidiaries against all losses or liabilities incurred in their capacities as such to the fullest extent permitted by applicable laws.

The merger agreement requires Bank of America to maintain for a period of six years after completion of the merger Merrill Lynch's current directors' and officers' liability insurance policy, or policies of at least the same coverage and amount and containing terms and conditions that are not less advantageous than the current policy, with respect to acts or omissions occurring prior to completion of the merger, except that Bank of America is not required to incur an annual premium expense greater than 250% of Merrill Lynch's current annual directors' and officers' liability insurance premium. If Bank of America is unable to maintain such a policy because the annual premium expense is greater than 250% of Merrill Lynch's current annual directors' and officers' liability insurance premium, Bank of America is obligated to obtain as much comparable insurance as is available for the amount that is 250% of Merrill Lynch's current premium.

### **Conditions to Complete the Merger**

Our respective obligations to complete the merger are subject to the fulfillment or waiver of certain conditions, including:

- the adoption of the merger agreement by Merrill Lynch stockholders;
- the approval of the issuance of shares of common stock of Bank of America by Bank of America stockholders;
- the approval of the listing of the Bank of America common stock to be issued in the merger on the NYSE, subject to official notice of issuance;
- the effectiveness of the registration statement of which this document is a part with respect to the Bank of America common stock and preferred stock to be issued in connection with the merger under the Securities Act and the absence of any stop order or proceedings initiated or threatened by the SEC for that purpose; and
- the absence of any order, decree or injunction by any court or other governmental entity or other law that prohibits or makes illegal completion of the transactions contemplated by the merger agreement.

Each of Bank of America's and Merrill Lynch's obligations to complete the merger is also separately subject to the satisfaction or waiver of a number of conditions including:

- the receipt by each of Bank of America and Merrill Lynch of a legal opinion with respect to certain United States federal income tax consequences of the merger;
- the receipt and effectiveness of all governmental and other approvals, registrations and consents, and the expiration of all related waiting periods required to complete the merger; and
- the truth and correctness of the representations and warranties of the other party in the merger agreement, subject to the materiality standard provided in the merger agreement, and the performance by the other party in all material respects of its obligations under the merger agreement and the receipt of certificates from the other party to that effect.

As discussed under "Recent Developments," Bank of America and Merrill Lynch have determined to waive the tax opinion closing conditions under certain circumstances.

We cannot provide assurance as to when or if all of the conditions to the merger can or will be satisfied or waived by the appropriate party. As of the date of this document, we have no reason to believe that any of these conditions will not be satisfied.

Table of Contents**Termination of the Merger Agreement**

The merger agreement can be terminated at any time prior to completion of the merger by mutual consent of Bank of America and Merrill Lynch if authorized in a written instrument by each of our boards of directors, or by either party in the following circumstances:

- if any of the required regulatory approvals are denied or completion of the merger has been enjoined, prohibited or made illegal by a court or other governmental entity (and the denial or prohibition is final and nonappealable);
- if the merger has not been completed by September 15, 2009, unless the failure to complete the merger by that date is due to the terminating party's failure to abide by the merger agreement;
- if there is a breach by the other party that would cause the failure of the closing conditions described above, unless the breach is capable of being, and is, cured within 30 days following written notice of the breach to the party committing the breach;
- if the other party has committed a breach in any material respect of its obligation to use reasonable best efforts to obtain stockholder approval;
- if the Merrill Lynch stockholders fail to adopt the merger agreement at the special meeting convened for purposes of adopting the merger agreement; or
- if the Bank of America stockholders fail to approve the issuance of shares of Bank of America common stock to Merrill Lynch stockholders at the special meeting convened for the purpose of approving the issuance of shares of Bank of America common stock in the merger.

In addition, Bank of America may terminate the merger agreement if:

- Merrill Lynch's board of directors (1) fails to recommend the adoption of the merger agreement by the Merrill Lynch stockholders, (2) makes any Change of Recommendation, (3) approves or recommends any Alternative Proposal or publicly proposes to do so, or (4) fails to recommend that the Merrill Lynch stockholders reject any tender offer or exchange offer that constitutes an Alternative Transaction within the statutorily provided time for making such a recommendation; or
- Merrill Lynch materially breaches its agreement to use reasonable best efforts to obtain stockholder approval.

**Effect of Termination**

If the merger agreement is terminated, it will become void and have no effect, and there will be no liability on the part of Bank of America, Merrill Lynch or any of their respective subsidiaries, except that (1) both Bank of America and Merrill Lynch will remain liable for any knowing breach of the merger agreement and (2) designated provisions of the merger agreement will survive the termination, including, but not limited to, the confidential treatment of information and publicity restrictions. In the event of any termination of the merger agreement, the stock option agreement will remain in full force and effect in accordance with its terms. Please see the section entitled "Stock Option Agreement" starting on page 91 for a description of the stock option agreement.

**Expenses and Fees**

In general, each of Bank of America and Merrill Lynch will be responsible for all expenses incurred by it in connection with the negotiation and completion of the transactions contemplated by the merger agreement, whether or not the merger is completed. However, the costs and expenses of printing and mailing this document, and all filing and other fees paid to the SEC in connection with the merger, will be borne equally by Merrill Lynch and Bank of America.

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**Amendment, Waiver and Extension of the Merger Agreement**

Subject to applicable law, the parties may amend the merger agreement by action taken or authorized by their respective boards of directors at any time before or after approval of matters presented in connection with the merger by the stockholders of each of the parties. However, after any adoption of the merger agreement by the Merrill Lynch stockholders or the approval of the issuance of shares of Bank of America common stock by the Bank of America stockholders, there may not be, without further approval of those stockholders, any amendment of the merger agreement that requires further approval under applicable law.

At any time prior to the completion of the merger, each of us, by action taken or authorized by our respective boards of directors, to the extent legally allowed, may:

- extend the time for the performance of any of the obligations or other acts of the other party;
- waive any inaccuracies in the representations and warranties of the other party; or
- waive compliance by the other party with any of the other agreements or conditions contained in the merger agreement.

Table of Contents**WHERE YOU CAN FIND MORE INFORMATION**

Bank of America has filed with the SEC a registration statement under the Securities Act that registers the distribution to Merrill Lynch stockholders of the shares of Bank of America common stock to be issued in connection with the merger. The registration statement, including the attached exhibits and schedules, contains additional relevant information about Bank of America and Bank of America stock. The rules and regulations of the SEC allow us to omit certain information included in the registration statement from this document.

You may read and copy this information at the Public Reference Room of the SEC at 100 F Street, NE, Room 1580, Washington, D.C. 20549. You may obtain information on the operation of the SEC's Public Reference Room by calling the SEC at 1-800-SEC-0330. The SEC also maintains an internet website that contains reports, proxy statements and other information about issuers, like Bank of America and Merrill Lynch, who file electronically with the SEC. The address of the site is <http://www.sec.gov>. The reports and other information filed by Bank of America with the SEC are also available at Bank of America's website at <http://www.bankofamerica.com>. The reports and other information filed by Merrill Lynch with the SEC are also available at Merrill Lynch's investor relations website at <http://www.ir.ml.com>. We have included the web addresses of the SEC, Bank of America, and Merrill Lynch as inactive textual references only. Except as specifically incorporated by reference into this document, information on those web sites is not part of this document.

The SEC allows Bank of America and Merrill Lynch to incorporate by reference information in this document. This means that Bank of America and Merrill Lynch can disclose important information to you by referring you to another document filed separately with the SEC. The information incorporated by reference is considered to be a part of this document, except for any information that is superseded by information that is included directly in this document.

This document incorporates by reference the documents listed below that Bank of America and Merrill Lynch previously filed with the SEC. They contain important information about the companies and their financial condition.

**Bank of America SEC Filings**

(SEC File No. 001-06523; CIK No. 0000070858)

**Period or Date Filed**

Annual Report on Form 10-K

Year ended December 31, 2007

Proxy Statement

Dated March 19, 2008

Quarterly Reports on Form 10-Q

Quarters ended March 30, 2008 and June 30, 2008

Current Reports on Form 8-K

Current Reports for events that occurred on July 1, 2008, July 21, 2008, July 23, 2008, July 25, 2008, and September 15, 2008 (two filings) October 2, 2008, October 3, 2008, October 6, 2008, October 7, 2008, and October 26, 2008 (other than the portions of those documents not deemed to be filed)

The description of Bank of America common stock set forth in a registration statement filed pursuant to Section 12 of the Exchange Act and any amendment or report filed for the purpose of updating those descriptions



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## Merrill Lynch SEC Filings

(SEC File No. 001-07182; CIK No. 0000065100)

Annual Report on Form 10-K  
 Proxy Statement  
 Quarterly Reports on Form 10-Q  
 Current Reports on Form 8-K

## Period or Date Filed

Year ended December 28, 2007  
 Dated March 14, 2008  
 Quarters ended March 28, 2008 and June 27, 2008  
 Current Reports for events that occurred on June 27, 2008 (two filings), June 30, 2008 (four filings), July 3, 2008, July 7, 2008 (six filings), July 11, 2008, July 14, 2008, July 17, 2008, July 25, 2008, July 28, 2008 (two filings), July 29, 2008 (two filings), July 30, 2008 (two filings), July 31, 2008 (two filings), August 1, 2008, August 7, 2008 (two filings), August 8, 2008 (six filings), August 12, 2008, August 21, 2008, August 26, 2008 (two filings), August 28, 2008, September 3, 2008, September 4, 2008, September 8, 2008, September 9, 2008 (four filings), September 14, 2008, September 15, 2008, September 18, 2008, September 29, 2008, October 1, 2008, October 3, 2008 (four filings), October 6, 2008, October 7, 2008, October 16, 2008, and October 26, 2008 (other than the portions of those documents not deemed to be filed)

In addition, Bank of America and Merrill Lynch also incorporate by reference additional documents that either company files with the SEC under Sections 13(a), 13(c), 14 and 15(d) of the Securities Exchange Act of 1934, as amended, between the date of this document and the date of the Merrill Lynch special meeting. These documents include periodic reports, such as Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q and Current Reports on Form 8-K, as well as proxy statements.

Bank of America has supplied all information contained or incorporated by reference in this document relating to Bank of America, as well as all pro forma financial information, and Merrill Lynch has supplied all information relating to Merrill Lynch.

Documents incorporated by reference are available from Bank of America and Merrill Lynch without charge, excluding any exhibits to those documents unless the exhibit is specifically incorporated by reference as an exhibit in this document. You can obtain documents incorporated by reference in this document by requesting them in writing or by telephone from the appropriate company at the following addresses:

Bank of America Corporation

Bank of America Corporate Center

100 N. Tryon Street

Charlotte, North Carolina 28255

Investor Relations

Telephone: (704) 386-5681

Merrill Lynch & Co., Inc.

222 Broadway —17th Floor

New York, New York 10038

Attention: Judith A. Witterschein

Corporate Secretary

Telephone: (212) 670-0432

***Bank of America stockholders and Merrill Lynch stockholders requesting documents should do so by November 28, 2008, to receive them before their special meeting. You will not be charged for any of these documents that you request. If you request any incorporated documents from Bank of America or Merrill Lynch, Bank of America or Merrill Lynch will mail them to you by first class mail, or another equally prompt means, as soon as practicable after it receives your request.***

**You should rely only on the information contained or incorporated by reference in this document. Neither Bank of America nor Merrill Lynch has authorized anyone to give any information or make any representation about the merger or our companies that is different from, or in addition to, that contained in this document or in any of the materials that have been incorporated in this document. Therefore, if anyone does give you information of this sort, you should not rely on it. You should assume that the information in this document is accurate only as of October 31, 2008. You should also assume that the information contained in any document incorporated by reference herein is accurate only as of**



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the date of such document. Neither the mailing of this document to stockholders nor the issuance of Bank of America common stock creates any implication to the contrary.

If you are in a jurisdiction where offers to exchange or sell, or solicitations of offers to exchange or purchase, the securities offered by this document or the solicitation of proxies is unlawful, or if you are a person to whom it is unlawful to direct these types of activities, then the offer presented in this document does not extend to you. The information contained in this document speaks only as of the date of this document unless the information specifically indicates that another date applies.

This document contains a description of the representations and warranties that each of Bank of America and Merrill Lynch made to the other in the merger agreement. Representations and warranties made by Bank of America, Merrill Lynch and other applicable parties are also set forth in contracts and other documents (including the merger agreement) that are attached or filed as exhibits to this document or are incorporated by reference into this document. These representations and warranties were made as of specific dates, may be subject to important qualifications and limitations agreed to between the parties in connection with negotiating the terms of the merger agreement, and may have been included in the agreement for the purpose of allocating risk between the parties rather than to establish matters as facts. These materials are included or incorporated by reference only to provide you with information regarding the terms and conditions of the agreements, and not to provide any other factual information regarding Merrill Lynch, Bank of America or their respective businesses. Accordingly, the representations and warranties and other provisions of the merger agreement should not be read alone, but instead should be read only in conjunction with the other information provided elsewhere in this document or incorporated by reference into this document.

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APPENDIX A

AGREEMENT AND PLAN OF MERGER

by and between

MERRILL LYNCH & CO., INC.

and

BANK OF AMERICA CORPORATION

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DATED AS OF SEPTEMBER 15, 2008

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Exhibit A — Stock Option Agreement

Exhibit B — Amendment to Surviving Company Certificate of Incorporation

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IN WITNESS WHEREOF, Company and Parent have caused this Agreement to be executed by their respective officers thereunto duly authorized as of the date first above written.

MERRILL LYNCH & CO., INC.

By: /s/ John A. Thain

Name: John A. Thain

Title: Chairman and Chief Executive Officer

BANK OF AMERICA CORPORATION

By: /s/ Kenneth D. Lewis

Name: Kenneth D. Lewis

Title: Chairman, Chief Executive Officer and President

*Signature Page to Agreement and Plan of Merger*

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## **Exhibit 15**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

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\*\* C O N F I D E N T I A L \*\*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
Master File No. 09-MD-2058 (PKC)

-----x  
IN RE BANK OF AMERICA CORP. SECURITIES,  
DERIVATIVE AND EMPLOYMENT RETIREMENT  
INCOME SECURITY ACT (ERISA) LITIGATION  
-----x

THIS DOCUMENT RELATES TO  
All Securities Actions  
-----x

IN THE COURT OF CHANCERY  
OF THE STATE OF DELAWARE  
C.A. No. 4307-CS  
-----x

IN RE BANK OF AMERICA CORPORATION  
STOCKHOLDER DERIVATIVE LITIGATION  
-----x

March 5, 2012  
9:36 a.m.

Videotaped Deposition of NICHOLAS  
DEMMO, taken by Plaintiffs, pursuant to  
Notice, held at the offices of Kaplan Fox  
& Kilsheimer LLP, 850 Third Avenue, New  
York, New York, before Todd DeSimone, a  
Registered Professional Reporter and  
Notary Public of the State of New York.

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516-608-2400



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1 DEMMO - CONFIDENTIAL

2 time the market opened on Monday morning. 10:00:17AM

3 Q. And why is that? 10:00:20AM

4 MR. LIMAN: Objection to the 10:00:22AM

5 form. 10:00:23AM

6 A. The reason that people were 10:00:24AM

7 trying to get the deal announced by Monday 10:00:25AM

8 morning is to, you know, get rid of the 10:00:28AM

9 risk that there might be a run on Merrill 10:00:30AM

10 Lynch as a result of Lehman going 10:00:33AM

11 bankrupt. 10:00:34AM

12 Q. When did you stop working on -- 10:00:37AM

13 if you recall, when did you stop working 10:00:54AM

14 on a potential Lehman transaction? 10:00:57AM

15 A. I'm not positive if it was the 10:01:01AM

16 Friday or if it was, you know, into 10:01:07AM

17 Saturday. I think it was either of those 10:01:11AM

18 two days, but, again, I don't remember 10:01:14AM

19 specifically. 10:01:16AM

20 Q. In terms of SEC filings, what, 10:01:17AM

21 if any, SEC filings were you involved in 10:01:32AM

22 drafting on behalf of Bank of America 10:01:35AM

23 during the period September 13, 2008 10:01:39AM

24 through January 21, 2009? 10:01:42AM

25 A. From announcement to the Bank 10:01:46AM

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2 of America earnings announcement, I recall 10:01:50AM  
3 being involved in working on the 8-K that 10:01:52AM  
4 Bank of America filed to announce the 10:01:58AM  
5 transaction. I'm not sure whether there 10:01:59AM  
6 was one or two. There may have been two 10:02:01AM  
7 8-Ks in connection with that. There were 10:02:04AM  
8 multiple filings of a registration 10:02:08AM  
9 statement on Form S-4, including a final 10:02:11AM  
10 amendment to the Form S-4 on a Form 424. 10:02:15AM

11 And I think that we were 10:02:25AM  
12 involved in the 8-K that was filed in 10:02:27AM  
13 connection with the earnings release as a 10:02:33AM  
14 result of the -- because we had been 10:02:36AM  
15 working on the TARP and the other elements 10:02:37AM  
16 of government assistance, so I think we 10:02:39AM  
17 helped on that as well. 10:02:42AM

18 Q. That's the earnings release 10:02:43AM  
19 that was issued in January 2009? 10:02:45AM

20 A. The 8-K that was filed when the 10:02:49AM  
21 earnings release came out, yes. 10:02:51AM

22 Q. And did you have any 10:02:53AM  
23 involvement in drafting or commenting on 10:02:56AM  
24 Bank of America's quarterly report for its 10:03:01AM  
25 third quarter of 2008? 10:03:07AM

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2 point, could Merrill pay up to \$5.8 10:16:11AM

3 billion in VICP bonuses for 2008 prior to 10:16:15AM

4 the merger? 10:16:22AM

5 MR. LIMAN: Objection to the 10:16:23AM

6 form. 10:16:24AM

7 A. Well, subject to -- subject to 10:16:25AM

8 the rest of the terms, in terms of the 10:16:30AM

9 VICP expense not exceeding \$4.5 billion 10:16:32AM

10 minus other comp expense, the points about 10:16:37AM

11 the form of award, change in control 10:16:42AM

12 terms, you know, consultation about the 10:16:47AM

13 allocation among employees; but subject to 10:16:51AM

14 those things, yes. 10:16:53AM

15 Q. You've testified I believe that 10:16:55AM

16 this disclosure schedule was not publicly 10:16:58AM

17 available, correct? 10:17:01AM

18 A. Correct. 10:17:02AM

19 Q. And you never advised anyone at 10:17:02AM

20 BofA prior to December 5th, 2008 -- I'm 10:17:08AM

21 sorry, strike that. 10:17:13AM

22 You never advised anyone at 10:17:13AM

23 BofA prior to the December 5th, 2008 10:17:15AM

24 shareholder vote whether the VICP 10:17:19AM

25 agreement should be publicly disclosed; is 10:17:22AM

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2 that correct? 10:17:29AM

3 A. Could you read the question 10:17:29AM

4 back? I didn't -- this wasn't required 10:17:30AM

5 disclosure and I never told before or 10:17:32AM

6 after December 5th that this should have 10:17:35AM

7 been disclosed. 10:17:37AM

8 MR. FOX: I move to strike that 10:17:38AM

9 answer. Can you read back the question, 10:17:39AM

10 please. 10:17:41AM

11 MR. LIMAN: I think the answer 10:17:41AM

12 is perfectly responsive. 10:17:43AM

13 MR. ANDERS: It was responsive 10:17:44AM

14 to the question. It is what it is. 10:17:45AM

15 (The record was read.) 10:18:01AM

16 MR. LIMAN: Objection. Asked 10:18:03AM

17 and answered. 10:18:05AM

18 A. I didn't advise anyone to 10:18:05AM

19 disclose it and I would not have advised 10:18:07AM

20 anyone to disclose it. 10:18:10AM

21 Q. I'm just trying to actually get 10:18:18AM

22 at the fact of it here, not whether you 10:18:21AM

23 would or wouldn't have. 10:18:23AM

24 Is it correct to say that you 10:18:26AM

25 never issued, or Wachtell never issued 10:18:28AM

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2 legal advice to Bank of America that it 10:18:31AM

3 did not have to disclose the VICP 10:18:39AM

4 exception contained in the disclosure 10:18:45AM

5 schedule? 10:18:46AM

6 MR. LIMAN: Objection to form. 10:18:47AM

7 MR. ANDERS: Objection. Asked 10:18:48AM

8 and answered. 10:18:53AM

9 A. We never told Bank of America 10:18:53AM

10 that they didn't have to disclose it, but 10:18:54AM

11 I think it would be safe for Bank of 10:18:56AM

12 America to assume that if we didn't 10:18:58AM

13 disclose something like this, it was in a 10:19:00AM

14 document that we knew about and were 10:19:03AM

15 involved in, that the disclosure wasn't 10:19:04AM

16 required. 10:19:06AM

17 MR. FOX: Again, move to strike 10:19:09AM

18 the last part of the disclosure about what 10:19:10AM

19 would be assumed. 10:19:14AM

20 MR. LIMAN: I think it is 10:19:15AM

21 responsive. 10:19:16AM

22 Q. Did you discuss with anyone at 10:19:27AM

23 BofA at any point prior to December 5th, 10:19:29AM

24 2008 whether the VICP information 10:19:33AM

25 contained in this disclosure schedule was 10:19:38AM

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2 material to Bank of America shareholders? 10:19:40AM

3 MR. LIMAN: Objection to the 10:19:46AM

4 form. 10:19:46AM

5 A. Can you repeat the question, 10:19:48AM

6 please? 10:19:49AM

7 (The record was read.) 10:20:03AM

8 A. I never discussed this in that 10:20:06AM

9 context. 10:20:08AM

10 Q. Do you have an understanding of 10:20:10AM

11 what "material" means as a legal term in 10:20:15AM

12 the context of the federal securities 10:20:21AM

13 laws? 10:20:24AM

14 A. Yes. 10:20:25AM

15 Q. And that term generally 10:20:25AM

16 concerns whether information would be 10:20:28AM

17 significant to an investor in light of the 10:20:30AM

18 total mix of information available to that 10:20:33AM

19 investor; is that correct? 10:20:36AM

20 MR. LIMAN: Objection. 10:20:37AM

21 A. As a general proposition, and 10:20:40AM

22 depending upon the context, whether it is 10:20:43AM

23 a vote or buying securities or whatever it 10:20:45AM

24 happens to be, yes. 10:20:47AM

25 Q. And were you aware in the fall 10:20:48AM

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2 of 2008 there was a Congressional 10:20:51AM

3 investigation by Congressman Waxman which 10:20:57AM

4 included inquiries into compensation and 10:21:02AM

5 bonuses? 10:21:05AM

6 A. Across the financial services 10:21:05AM

7 industry generally, yes, I recall that. 10:21:07AM

8 Q. And were you aware that around 10:21:09AM

9 the same time that the New York Attorney 10:21:11AM

10 General had sent letters to various banks, 10:21:16AM

11 including Bank of America, regarding 10:21:20AM

12 compensation? 10:21:23AM

13 MR. ANDERS: Objection. 10:21:25AM

14 A. Yes. 10:21:26AM

15 Q. And did you consider the 10:21:26AM

16 possibility of disclosing the VICP cap 10:21:29AM

17 prior to December 5th in light of the 10:21:34AM

18 heightened public scrutiny regarding bank 10:21:37AM

19 compensation practices? 10:21:40AM

20 MR. LIMAN: Objection to the 10:21:41AM

21 form. 10:21:42AM

22 THE WITNESS: Read that back, 10:21:43AM

23 please. 10:21:44AM

24 (The record was read.) 10:21:57AM

25 A. You know, I don't remember 10:21:58AM

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2 specifically this period of 2008. I mean, 10:22:00AM

3 whenever you have something going on you 10:22:03AM

4 are always considering whether information 10:22:05AM

5 might be material. 10:22:07AM

6 But, you know, today I 10:22:09AM

7 certainly don't think this was material, 10:22:10AM

8 and I don't recall thinking at the time 10:22:12AM

9 that even in light of what was going on 10:22:13AM

10 politically that this was material to 10:22:15AM

11 investors, no. 10:22:17AM

12 MR. FOX: Could I hear that 10:22:26AM

13 answer back, please. 10:22:27AM

14 (The record was read.) 10:22:51AM

15 MR. FOX: Move to strike the 10:22:52AM

16 part of the answer that starts "But, you 10:22:54AM

17 know, today," as nonresponsive. 10:22:57AM

18 MR. LIMAN: It is responsive. 10:22:59AM

19 MR. FOX: I didn't ask that 10:23:01AM

20 question, so it's not. 10:23:02AM

21 MR. LIMAN: It is. You don't 10:23:03AM

22 just get to edit the answers to exclude 10:23:05AM

23 things you don't like. 10:23:08AM

24 MR. FOX: It is not that I 10:23:10AM

25 don't like them. I didn't ask the 10:23:12AM



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2 question. The witness doesn't get to 10:23:13AM

3 answer -- 10:23:17AM

4 MR. ANDERS: Just keep asking 10:23:18AM

5 questions. 10:23:19AM

6 MR. FOX: -- questions that 10:23:19AM

7 aren't asked. 10:23:19AM

8 MR. ANDERS: It is more 10:23:20AM

9 productive to keep asking questions and 10:23:21AM

10 keep going. It is on the transcript. 10:23:23AM

11 MR. FOX: We are going to keep 10:23:23AM

12 going. That's what we are going to do. 10:23:25AM

13 Q. Just to follow up on that, I 10:23:33AM

14 think you said, in part of that last 10:23:36AM

15 answer, that you didn't consider the 10:23:40AM

16 information material in 2008, the VICP 10:23:41AM

17 bonus information, you didn't consider 10:23:45AM

18 that material; is that correct? I think 10:23:47AM

19 you said that. 10:23:49AM

20 A. That's true. 10:23:50AM

21 Q. And what analysis did you 10:23:51AM

22 undertake to determine whether that 10:23:52AM

23 information was material at that time? 10:23:55AM

24 Tell me what you did. 10:23:58AM

25 A. I have no idea. This was three 10:23:59AM

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2 years ago. I knew that this existed. We 10:24:01AM

3 had a merger proxy. You are including 10:24:03AM

4 material information. This was not 10:24:05AM

5 related to the merger truly. It was 10:24:09AM

6 ordinary course payments to employees. 10:24:11AM

7 If it had been executive 10:24:14AM

8 officers who eventually got an award, you 10:24:15AM

9 would have had to have considered that 10:24:18AM

10 because there is disclosure around that 10:24:20AM

11 because it raises potential conflicts 10:24:21AM

12 issues. 10:24:23AM

13 But, you know, you are talking 10:24:24AM

14 here about, you know, bonuses that they've 10:24:25AM

15 been generally accruing for during the 10:24:28AM

16 year, it is bonuses you get to pay people 10:24:30AM

17 to keep them. You are buying a people 10:24:35AM

18 business. 10:24:37AM

19 Q. That's what you do, right? 10:24:37AM

20 A. That's what you do. 10:24:38AM

21 Q. You don't recall anything that 10:24:40AM

22 you did in 2008 to make any determination 10:24:43AM

23 as to whether the information that's 10:24:46AM

24 contained in the disclosure schedule as it 10:24:49AM

25 relates to VICP bonuses was material; is 10:24:53AM

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2 Forbearances if such actions were 03:16:52PM

3 contemplated or permitted by the 03:16:57PM

4 agreements? 03:16:58PM

5 A. Yes. 03:17:02PM

6 Q. Now, you were also asked -- you 03:17:04PM

7 can put that down, Mr. Demmo. 03:17:06PM

8 You were also asked by Mr. Fox 03:17:07PM

9 questions with respect to the advice that 03:17:12PM

10 Wachtell provided with respect to 03:17:17PM

11 disclosure of the cap on VICP. Do you 03:17:21PM

12 recall being asked questions about that 03:17:25PM

13 topic? 03:17:27PM

14 MR. FOX: Objection. 03:17:27PM

15 A. Yes. 03:17:28PM

16 Q. And you gave an answer, 03:17:28PM

17 Mr. Demmo, that you could understand how 03:17:32PM

18 Bank of America could assume from 03:17:35PM

19 Wachtell's review that Wachtell did not 03:17:43PM

20 think that disclosure was required. Do 03:17:46PM

21 you recall giving that answer? 03:17:49PM

22 MR. FOX: Objection. 03:17:51PM

23 A. I don't remember specifically 03:17:51PM

24 what we said, but we knew -- we knew the 03:17:52PM

25 VICP arrangement, and we were, you know, 03:17:56PM

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2 one of the two law firms and really the 03:18:00PM  
3 main law firm drafting the merger proxy, 03:18:02PM  
4 and if we thought that the VICP needed to 03:18:05PM  
5 be disclosed expressly in the merger 03:18:07PM  
6 proxy, we would have put it in there and 03:18:10PM  
7 it is safe for Bank of America to assume 03:18:13PM  
8 that we would do that. 03:18:16PM

9 Q. And am I correct, sir, that you 03:18:22PM  
10 never indicated to Bank of America that 03:18:24PM  
11 disclosure of the cap on VICP was 03:18:25PM  
12 required? 03:18:28PM

13 MR. FOX: Objection. 03:18:29PM

14 A. That's correct. 03:18:30PM

15 MR. LIMAN: What's the basis of 03:18:33PM  
16 the objection? 03:18:34PM

17 MR. FOX: To form. 03:18:35PM

18 MR. LIMAN: Are you willing to 03:18:37PM  
19 tell me anything more besides form? 03:18:38PM

20 MR. FOX: No. 03:18:40PM

21 Q. Now, you also were asked 03:18:45PM  
22 questions -- withdrawn. 03:18:47PM

23 Mr. Fox also asked you a 03:18:48PM  
24 question about whether you conducted any 03:18:50PM  
25 analysis of whether the disclosure of the 03:18:54PM

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2 VICP cap was required in the proxy 03:18:58PM

3 statement. 03:19:01PM

4 Do you recall being asked 03:19:01PM

5 questions about that general topic? 03:19:02PM

6 A. Yes. 03:19:04PM

7 Q. Sir, did you bring any legal 03:19:05PM

8 expertise to bear on the question of 03:19:12PM

9 whether disclosure of the VICP cap was 03:19:15PM

10 required? 03:19:18PM

11 A. Well, again, I mean, I knew 03:19:19PM

12 about the VICP cap, and I have been doing 03:19:21PM

13 this for, whatever, 14 and a half years, 03:19:25PM

14 and there wasn't something that needed to 03:19:29PM

15 be disclosed. 03:19:31PM

16 MR. LIMAN: I've got nothing 03:19:32PM

17 further. Thank you. 03:19:35PM

18 MR. JEFFRESS: I have no 03:19:37PM

19 questions. 03:19:38PM

20 MR. FOX: I just have one 03:19:39PM

21 follow-up question. 03:19:43PM

22 EXAMINATION BY MR. FOX: 03:19:43PM

23 Q. Are you familiar with Section 03:19:45PM

24 10b of the Exchange Act and Rule 10b-5? 03:19:46PM

25 A. Yes. 03:19:51PM

## **Exhibit 16**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

**From:** Demmo, Nicholas G.  
**Sent:** Thursday, September 18, 2008 11:48 AM  
**To:** Brenner, Teresa M. (Bank of America Corporation); Stitt, Kevin (Bank of America Corporation); 'McEntire, Lee'; 'Pakzad, Leyla'; Stickler, Robert L. (Bank of America Corporation); 'Silvestri, Scott'; 'Noneman, Patricia J'; Shearer, Randy J. (Bank of America Corporation)  
**Cc:** Mayopoulos, Timothy J. (timothy.mayopoulos@bankofamerica.com); Fieldston, Ross A.; Veblen, Mark F.  
**Subject:** RE: URGENT: RE: BAC: Form 8-K (MER/Merger Agreement).DOC  
**Attachments:** #1294168v14\_WLRK\_ - MER\_BAC merger agreement.DOC



#1294168v14\_WLRK\_ - MER\_BAC me...

Final is attached.

---

**From:** Brenner, Teresa -Legal [mailto:teresa.brenner@bankofamerica.com]  
**Sent:** Thursday, September 18, 2008 11:46 AM  
**To:** Stitt, Kevin (Bank of America Corporation); McEntire, Lee; Pakzad, Leyla; Stickler, Robert L. (Bank of America Corporation); Silvestri, Scott; Noneman, Patricia J; Shearer, Randy J. (Bank of America Corporation)

**Cc:** Mayopoulos, Timothy J. (Bank of America Corporation); Fieldston, Ross A.; Veblen, Mark F.; Demmo, Nicholas G.  
**Subject:** URGENT: RE: BAC: Form 8-K (MER/Merger Agreement).DOC

This 8-K will be filed at 12:15 p.m. today.

Ross, please send all of the Bank of America addresses on this e-mail a copy of the final merger agreement immediately.

---

**From:** Brenner, Teresa -Legal  
**Sent:** Thursday, September 18, 2008 11:17 AM  
**To:** Stitt, Kevin; McEntire, Lee; Pakzad, Leyla; Stickler, Robert L; Silvestri, Scott; Noneman, Patricia J; Shearer, Randy J  
**Cc:** Mayopoulos, Timothy; RAFieldston@wlrk.com  
**Subject:** BAC: Form 8-K (MER/Merger Agreement).DOC

All,

Please see the attached draft of the BAC Form 8-K regarding the Merrill Lynch acquisition.

Redacted by BAC

Redacted by BAC

The long summary approach is in response to SEC guidance issued this summer. If you have any comments or questions, please call me at D&P Redaction or Ross at D&P Redaction.

Thanks,  
Teresa



## **Exhibit 17**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

Jeffrey P. Crandall

November 30, 2009

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C O N F I D E N T I A L

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

09-CV-6829

BANK OF AMERICA CORP.,

Defendant.

---

November 30, 2009  
9:44 a.m.

Videotaped deposition of JEFFREY P. CRANDALL,  
taken by Plaintiff, pursuant to Subpoena, held  
at Securities and Exchange Commission, Three  
World Financial Center, New York, New York,  
before Lisa Rosenfeld, a Shorthand Reporter and  
Notary Public within and for the State of New  
York.

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2 Q. In the transactions that you have  
3 worked on, did your work also include the  
4 preparation of disclosure schedules?

5 A. Yes.

6 Q. What are disclosure schedules?

7 A. Disclosure schedules are schedules to  
8 a merger agreement that basically they cover a  
9 number of things. One is they list exceptions to  
10 representations and they typically will have  
11 provisions relating to covenants or expansion of  
12 certain covenants or exceptions to certain  
13 covenants. But a lot of it has to do with  
14 representations and exceptions to those  
15 representations.

16 Q. What is then the purpose of having  
17 the schedules?

18 A. The purpose of having the schedules  
19 is to basically go into some detail about things  
20 in the merger agreement where you want to make it  
21 clear that notwithstanding a particular provision  
22 in the merger agreement, there might be an  
23 exception. So it's a way of allocating risk  
24 between the parties or to make it clear in the  
25 case of a covenant that the target company is

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2 going to have flexibility to do certain things  
3 between the signing and the closing.

4 Q. Are the provisions that are put in  
5 disclosure schedules part of the agreement  
6 between the acquired company and the acquirer?

7 A. That's correct.

8 Q. Is there a reason why provisions are  
9 placed in the disclosure schedule as opposed to  
10 the merger agreement itself?

11 A. I think part of the reason, I mean  
12 sometimes the provisions are confidential,  
13 sometimes it's -- and I think a lot of it has to  
14 do with just common practice, that that's what  
15 practitioners typically do is put provisions in  
16 the disclosure schedules.

17 Q. Are compensation matters sometimes  
18 put in disclosure schedules?

19 A. Very often.

20 Q. And why are compensation matters  
21 placed in disclosure schedules?

22 A. I think there could be a variety of  
23 reasons. I mean I think number one is  
24 occasionally you'll find, for example, even in  
25 non-ordinary course of business thing that's

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1  
2 supposed to happen, for example target company  
3 will say, oh, I have a covenant that says I can't  
4 adopt a new plan, we need to adopt a defined  
5 benefit plan this quarter. I just want to give  
6 you the head's up that we're going to do it, so  
7 let's agree to an exception and put it in the  
8 schedule.

9 Q. Why would such an exception not be  
10 put in the merger agreement itself?

11 A. Very often it's confidential, these  
12 are things that may or may not happen, for  
13 example. You don't want to say to your work  
14 force we're going to do all these things when you  
15 may decide later on that you're not going to do  
16 those things.

17 Q. Aside from confidentiality, any other  
18 reasons for placing provisions relating to  
19 compensation matters in a disclosure schedule as  
20 opposed to in the merger agreement itself?

21 A. Sometimes it's competitive  
22 information that you wouldn't want to make  
23 publicly available in the context of  
24 compensation.

25 Q. What type of information would you

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2 consider competitive?

3 A. It could be lots of things, it could  
4 be new employment arrangement for senior  
5 management. It could be new programs that you  
6 intend to put in place. It could be incentive or  
7 stock options. It could be lots of things, new  
8 stock option grants that you intended to make.  
9 Those would very often be in the schedule.

10 Q. In the deals that you have worked on  
11 who made the determination with respect to  
12 compensation matters as to whether a provision is  
13 going to be in the merger agreement or a  
14 disclosure schedule?

15 MS. OH: Objection to form.

16 You can answer.

17 A. I mean in terms of the decision, I  
18 can say that the common practice in virtually all  
19 of the transactions that I've seen is that  
20 provisions relating to compensation, any  
21 exceptions to those -- the covenants, for  
22 example, in the merger agreement would be in the  
23 schedule. It's not something where you sit down  
24 and have a protracted discussion, gee, we put it  
25 in the merger agreement, do you put it in the

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2 schedules. It will invariably wind up in the  
3 schedules. That's a common practice for a long  
4 time.

5 Q. Would you say in the deals that you  
6 have worked on, for lack of a better word, the  
7 template of the document that you would use for  
8 the transaction had some compensation matters in  
9 the disclosure schedule?

10 MS. OH: Objection to form.

11 You can answer.

12 A. Very often there would be something  
13 in the disclosure schedule.

14 Q. Have you been instructed by a client  
15 in the past to put a provision related to  
16 compensation in a disclosure schedule?

17 MR. WEISBURG: In answering that  
18 question, just answer it yes or no, don't  
19 disclose any privileged communications  
20 with clients.

21 A. No.

22 Q. Have you ever suggested to a client  
23 that a certain provision relating to compensation  
24 be removed from the merger agreement and be  
25 placed in the disclosure schedule instead?

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2 MR. WEISBURG: Same instruction.

3 A. No.

4 Q. Is it your understanding that merger  
5 agreements in connection with transactions  
6 between public companies are publicly filed?

7 A. Yes.

8 Q. What is that understanding based on?

9 A. It's just an understanding based on  
10 the proxy rules in either Schedule 14a or S-4  
11 that there's a requirement to file the merger  
12 agreement and it's been done in every transaction  
13 I've ever worked on.

14 Q. How about disclosure schedules, are  
15 they publicly disclosed?

16 A. I have never seen a situation where a  
17 disclosure schedule had been filed.

18 Q. And do you know why?

19 A. I think it's -- one, it's been common  
20 practice, and number two, I will say that that's  
21 an area that I would defer to my M&A colleagues  
22 on because that comes within the area of their  
23 expertise.

24 Q. Would it be fair to say, Mr.  
25 Crandall, that disclosure schedules contain,



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2 among other things, exceptions from ordinary  
3 course items?

4 A. Not --

5 MR. WEISBURG: Can you read that  
6 back, please.

7 (Record read)

8 A. I don't think that's always true. I  
9 think that on occasion might be true depending on  
10 the circumstances.

11 Q. With respect to compensation matters,  
12 have you seen a disclosure schedule or have  
13 worked on a disclosure schedule that contained  
14 provisions allowing for the payment of  
15 compensation in the ordinary course in the  
16 disclosure schedule?

17 A. Yes.

18 MS. OH: Objection to form.

19 You can answer.

20 Q. Putting aside for a moment the Bank  
21 of America/Merrill Lynch transaction, have you  
22 ever worked on an M&A deal where discretionary  
23 year-end bonuses were provided for in a  
24 disclosure schedule?

25 A. I can say that it's been -- again

## **Exhibit 18**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

1  
2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK  
4 Master File No. 09-MD-2058 (PKC)

5 -----x  
6  
7 IN RE BANK OF AMERICA CORP. SECURITIES,  
8 DERIVATIVE AND EMPLOYMENT RETIREMENT  
9 INCOME SECURITY ACT (ERISA) LITIGATION  
10  
11 -----x

12 THIS DOCUMENT RELATES TO  
13 All Securities Actions  
14  
15 -----x

16 IN THE COURT OF CHANCERY  
17 OF THE STATE OF DELAWARE  
18 C.A. No. 4307-CS  
19  
20 -----x

21 IN RE BANK OF AMERICA CORPORATION  
22 STOCKHOLDER DERIVATIVE LITIGATION  
23  
24 -----x

25  
26 January 12, 2012  
27 9:33 a.m.

28 Videotaped Deposition of JEFFREY  
29 CRANDALL, taken by Plaintiffs, pursuant to  
30 Notice, held at the offices of Kaplan Fox  
31 & Kilsheimer LLP, 850 Third Avenue, New  
32 York, New York, before Todd DeSimone, a  
33 Registered Professional Reporter and  
34 Notary Public of the State of New York.  
35

1 J. CRANDALL

2 understand that you are out of the office. 11:05:15AM

3 Wachtell has deleted the reference to the 11:05:17AM

4 FA retention pool and the VICP in our 11:05:19AM

5 draft disclosure schedules." 11:05:21AM

6 Does that refresh your 11:05:22AM

7 recollection about Wachtell's position 11:05:24AM

8 with respect to whether the VICP provision 11:05:26AM

9 should be in the disclosure schedule? 11:05:29AM

10 A. My best recollection of this 11:05:31AM

11 e-mail was that this really just involved 11:05:33AM

12 that Wachtell -- I think they didn't know 11:05:41AM

13 where they were in the provision and they 11:05:44AM

14 just took it out, placeholder, and that it 11:05:46AM

15 was going to be addressed later. But I 11:05:50AM

16 didn't take this to mean that they were 11:05:52AM

17 objecting as a substantive matter to 11:05:55AM

18 putting it in the schedules. That's the 11:05:58AM

19 best of my recollection on that point. 11:06:01AM

20 Q. Do you recall Jeannemarie 11:06:03AM

21 O'Brien suggesting that the VICP provision 11:06:05AM

22 be in a waiver letter? 11:06:09AM

23 MS. PARK: Objection. 11:06:11AM

24 A. No. 11:06:12AM

25 Q. Now, at a certain point did the 11:07:30AM

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1 J. CRANDALL

2 terms of the VICP provision become 11:07:33AM

3 finalized? 11:07:39AM

4 A. Yes. 11:07:39AM

5 Q. And when was that? 11:07:40AM

6 A. I would say approximately the 11:07:42AM

7 third week of October. 11:07:44AM

8 Q. I'm going to hand to you what 11:07:48AM

9 has been previously marked Exhibit 139. 11:07:58AM

10 This document is Bates stamped 11:08:14AM

11 BAC-ML-NYAG00000280-UR to 301. And it is 11:08:18AM

12 the Disclosure Schedules to the Agreement 11:08:26AM

13 and Plan of Merger By and Between Merrill 11:08:28AM

14 Lynch & Company, Inc. and Bank of America 11:08:31AM

15 Corporation dated September 15th, 2008. 11:08:33AM

16 Is this the final version of 11:08:36AM

17 the disclosure schedule as you understand 11:08:38AM

18 it? 11:08:40AM

19 A. That's my understanding. 11:08:41AM

20 Q. And if you take a look at page 11:08:43AM

21 14, I'm not referring to the Bates number, 11:08:49AM

22 but actually the page number. 11:08:52AM

23 A. Okay. 11:08:54AM

24 Q. Does this reflect the agreement 11:08:56AM

25 between Bank of America and Merrill Lynch 11:09:01AM

1 J. CRANDALL

2 I'm sorry, Shearman's litigation 11:27:16AM

3 department was involved in? 11:27:19AM

4 A. Possibly involving some 11:27:20AM

5 end-of-the-year payments for senior 11:27:24AM

6 management. There may have been 11:27:25AM

7 discussions involving the litigation team. 11:27:27AM

8 But, again, I can't say I remember 11:27:29AM

9 definitively. 11:27:31AM

10 Q. And was that a disclosure issue 11:27:32AM

11 for the proxy? 11:27:38AM

12 A. No. 11:27:39AM

13 Q. Now, sometime in the fall of 11:27:53AM

14 2008 you considered whether the VICP 11:27:59AM

15 provision that's in the disclosure 11:28:01AM

16 schedule was required to be disclosed in 11:28:03AM

17 the proxy, correct? 11:28:07AM

18 A. That's correct. 11:28:08AM

19 Q. Could you describe how you came 11:28:09AM

20 to consider that question, the genesis of 11:28:11AM

21 that question? 11:28:14AM

22 A. Sure. I had reviewed the 11:28:15AM

23 proxy. My associate, my senior associate, 11:28:20AM

24 Patricia Kuhn had reviewed the proxy. 11:28:22AM

25 I had asked Patty to do a form 11:28:24AM

1 J. CRANDALL

2 considering whether this information, the 11:34:12AM  
3 VICP provision, was material and should be 11:34:15AM  
4 disclosed in the proxy, the correct 11:34:19AM  
5 analysis would be to analyze it on behalf 11:34:21AM  
6 of all investors, including Bank of 11:34:23AM  
7 America investors? 11:34:25AM

8 A. From my perspective, I suppose 11:34:26AM  
9 I could have said I'm looking at this from 11:34:29AM  
10 the perspective of my client, but that's 11:34:31AM  
11 not what I did. 11:34:33AM

12 Q. And you don't have an opinion 11:34:35AM  
13 one way or the other whether that's the 11:34:42AM  
14 correct analysis or not? 11:34:44AM

15 MS. PARK: Objection. 11:34:46AM

16 A. I would have deferred to the 11:34:47AM  
17 securities experts at my firm. But, 11:34:48AM  
18 again, I looked at -- I looked at it -- I 11:34:52AM  
19 did look at it from the perspective of 11:34:54AM  
20 both sets of shareholders. 11:34:55AM

21 Q. And what factors did you 11:35:07AM  
22 consider in determining whether the VICP 11:35:08AM  
23 provision was something that should be 11:35:12AM  
24 disclosed in the proxy? 11:35:15AM

25 A. There were a variety of 11:35:17AM

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1 J. CRANDALL

2 factors. The first is, as I had mentioned 11:35:19AM  
 3 already, I thought that what Wachtell had 11:35:22AM  
 4 drafted in terms of the description of 5.2 11:35:24AM  
 5 was correct. 11:35:27AM

6 Number two, I looked at who 11:35:28AM  
 7 would be participating in this bonus pool, 11:35:31AM  
 8 and there were approximately, my 11:35:35AM  
 9 understanding, was approximately 40,000 11:35:36AM  
 10 Merrill rank and file employees in that 11:35:39AM  
 11 pool and I noted that the SEC disclosure 11:35:41AM  
 12 rules clearly do not require disclosure 11:35:43AM  
 13 with respect to ordinary employee 11:35:46AM  
 14 compensation, rank and file employee 11:35:50AM  
 15 compensation. 11:35:52AM

16 I also noted that this was 11:35:53AM  
 17 really an ordinary course of business type 11:35:55AM  
 18 thing. This was consistent with past 11:35:58AM  
 19 practice. The amount that was -- the 11:36:00AM  
 20 outer parameter was in fact less than what 11:36:04AM  
 21 had been paid in the prior year. That was 11:36:06AM  
 22 one of the things I considered. 11:36:09AM

23 I had learned during the course 11:36:11AM  
 24 of our discussions that there had been an 11:36:12AM  
 25 accrual on Merrill Lynch's financial 11:36:17AM



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1 J. CRANDALL

2 statements through the third quarter for 11:36:19AM  
3 this expense and those financial 11:36:21AM  
4 statements were part of the disclosure to 11:36:23AM  
5 shareholders and the aggregate amount was 11:36:25AM  
6 already in there, at least in terms of 11:36:28AM  
7 what was accrued through that point in 11:36:30AM  
8 time. So that was already part of the 11:36:31AM  
9 record. 11:36:33AM

10 The other thing is I noted that 11:36:33AM  
11 this was a forbearance covenant, this 11:36:35AM  
12 wasn't a provision that said this is 11:36:38AM  
13 something that definitely will happen. 11:36:40AM  
14 This is something that can happen. This 11:36:42AM  
15 was an administrative provision that said 11:36:45AM  
16 between Merrill Lynch and Bank of America 11:36:46AM  
17 if there is certain things that Merrill 11:36:47AM  
18 thinks it should do, it has to come back 11:36:50AM  
19 for a discussion with Bank of America. 11:36:52AM

20 And I noted -- so, for example, 11:36:55AM  
21 if you had paid bonuses before the closing 11:36:57AM  
22 then this administrative process needed to 11:37:01AM  
23 take place. If you paid those bonuses a 11:37:03AM  
24 day after the closing, this provision 11:37:05AM  
25 would not have applied at all. That was 11:37:07AM

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1 J. CRANDALL

2 definitely part of the thinking. 11:37:09AM

3 And I think the other factor 11:37:11AM

4 is -- two other factors, one is that these 11:37:14AM

5 were not, as part of my ordinary course 11:37:16AM

6 analysis, these were not transaction 11:37:19AM

7 bonuses. These were not things that were 11:37:20AM

8 only happening because of the transaction. 11:37:23AM

9 They would have happened with or without 11:37:25AM

10 the transaction. And I think the other 11:37:27AM

11 thing and important factor is that we had 11:37:29AM

12 a separate provision -- a separate 11:37:32AM

13 covenant in the merger agreement, I 11:37:35AM

14 believe it was Section 6.5, which said 11:37:37AM

15 very clearly that through the end of 2009 11:37:39AM

16 shareholders should know that employees 11:37:42AM

17 are going to be receiving employee benefit 11:37:44AM

18 plans and compensation opportunities which 11:37:48AM

19 would have included bonuses that would 11:37:50AM

20 have been substantially comparable in the 11:37:53AM

21 aggregate to what they were getting 11:37:55AM

22 before. 11:37:57AM

23 So looking at all those factors 11:37:58AM

24 in the aggregate, my belief was that this 11:38:00AM

25 was not material and did not need to be 11:38:03AM

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1 J. CRANDALL  
2 disclosed. 11:38:05AM  
3 Q. Now, one of the things that you 11:38:22AM  
4 said that you looked at was the 11:38:23AM  
5 description of 5.2 was correct? 11:38:25AM  
6 A. Uh-huh. 11:38:29AM  
7 Q. And earlier you had said it was 11:38:29AM  
8 technically correct; is that right? 11:38:31AM  
9 A. Yes. 11:38:33AM  
10 Q. What do you mean by 11:38:33AM  
11 "technically correct"? 11:38:37AM  
12 A. It noted that -- it described 11:38:39AM  
13 the forbearance provision and it noted 11:38:41AM  
14 that there were exceptions which could 11:38:44AM  
15 have involved either getting Bank of 11:38:46AM  
16 America's consent and then it went on to 11:38:50AM  
17 note that there were other exceptions, and 11:38:52AM  
18 the merger agreement itself which was part 11:38:54AM  
19 of the proxy specifically said there were 11:38:56AM  
20 exceptions in Section 5.2 of the 11:38:59AM  
21 disclosure schedule. 11:39:01AM  
22 Q. Do you know if the disclosure 11:39:02AM  
23 schedule was publicly filed? 11:39:05AM  
24 A. It was not. 11:39:07AM  
25 Q. And at the time you were 11:39:08AM

## **Exhibit 19**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

**From:** Patricia A Kuhn <PKuhn@Shearman.com>  
**Sent:** Wednesday, October 22, 2008 5:15 PM  
**To:** Adam Kaminsky <adam.kaminsky@shearman.com>  
**Subject:** FW: WLRK Comments to Shearman 10/20 VICP Rider.DOC  
**Attach:** WLRK Comments to Shearman 10\_20 VICP Rider (2).DOC

---

here it is.

---

**From:** MKrasnovsky@wlrk.com [mailto:MKrasnovsky@wlrk.com]  
**Sent:** Monday, October 20, 2008 6:10 PM  
**To:** Patricia A Kuhn  
**Cc:** JMOBrien@wlrk.com; DKahan@wlrk.com  
**Subject:** WLRK Comments to Shearman 10/20 VICP Rider.DOC

Patty, see changes to the VICP rider that we discussed tracked in the attached. We believe our client is comfortable with these changes and would appreciate confirmation from you that yours is as well.

Thank you very much.

Mike

\*\*\*\*\*

Any tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of avoiding tax penalties and is not intended to be used or referred to in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement.

\*\*\*\*\*

Please be advised that this transmittal may be a confidential attorney-client communication or may otherwise be privileged or confidential. If you are not the intended recipient, please do not read, copy or re-transmit this communication. If you have received this communication in error, please notify us by e-mail (helpdesk@wlrk.com) or by telephone (call us collect at 212-403-4357) and delete this message and any attachments. Thank you in advance for your cooperation and assistance.

www.wlrk.com

\*\*\*\*\*

## RIDER

- 5.2(b)(iii), 5.2(c)(i) and 5.2 (c)(ii) - Variable Incentive Compensation Program (“VICP”) in respect of 2008 (including without limitation any guaranteed VICP awards for 2008 or any other pro rata or other 2008 VICP awards payable, paid or provided to terminating or former employees) may be awarded at levels that (i) do not exceed \$5.8 billion in aggregate value (inclusive of cash bonuses and the grant date value of long-term incentive awards) less any 2008 incentive compensation value (other than any value in respect of any replacement cash or long-term incentive awards) in respect of the New Hire Cash Compensation Pool, and (ii) do not result in 2008 VICP-related expense exceeding \$4.5 billion, less any 2008 incentive compensation expense (other than any expense in respect of any replacement cash or long-term incentive awards) in respect of the New Hire Cash Compensation Pool. Sixty percent of the overall 2008 VICP shall be awarded as a current cash bonus and forty percent of the overall 2008 VICP shall be awarded as a long-term incentive award either in the form of equity or long-term cash awards. The form (i.e., equity v. long-term cash) and terms and conditions of the long-term incentive awards shall be determined by the Company in consultation with Parent, *provided* that in no event shall such long-term incentive awards contain acceleration or vesting rights (whether single or double trigger and including the rights provided in the applicable Company equity incentive plan) in connection with the Merger (except for any such rights applicable to equity awards granted in satisfaction of a 2008 VICP guarantee to the extent specifically required by the terms of an offer letter entered into prior to September 14, 2008) or any “good reason” termination feature (including vesting in connection with a “good reason” termination, except any good reason termination

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feature applicable to equity awards granted in satisfaction of a 2008 VICP guarantee to the extent specifically required by the terms of an offer letter entered into prior to September 14, 2008). The allocation of the 2008 VICP among eligible employees shall be determined by the Company in consultation with Parent.

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## **Exhibit 20**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**



**EXECUTION VERSION**

---

**DISCLOSURE SCHEDULES<sup>1</sup>**

to

**AGREEMENT AND PLAN OF MERGER**

by and between

**MERRILL LYNCH & CO., INC.**

and

**BANK OF AMERICA CORPORATION**

Dated September 15, 2008

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<sup>1</sup> This Company Disclosure Schedule has been prepared and delivered pursuant to the Agreement and Plan of Merger, dated as of September 15, 2008 (the "Agreement"), by and between Merrill Lynch & Co., Inc., a Delaware corporation (the "Company"), and Bank of America Corporation, a Delaware corporation ("Parent").

This Company Disclosure Schedule and the information and disclosures contained herein are intended to qualify and limit the representations and warranties of the Company contained in the Agreement. Inclusion of any item in this Company Disclosure Schedule (i) shall not be deemed an admission that such item represents a material exception or material fact, event or circumstance or that such item has had or would have a Material Adverse Effect and (ii) shall not constitute, nor be deemed to be, an admission of liability concerning such item by the Company. Nor in such cases where a representation or warranty is qualified by a reference to materiality or Material Adverse Effect shall the disclosure of any matter in this Company Disclosure Schedule imply that any other undisclosed matter that has a greater value or could otherwise be deemed more significant (i) is or is reasonably likely to be material or (ii) has had or is reasonably likely to result in a Material Adverse Effect. Matters reflected in this Company Disclosure Schedule are not necessarily limited to matters required by the Agreement to be reflected in this Company Disclosure Schedule. Such additional matters are set forth for information purposes and do not necessarily include other matters of a similar nature. The headings contained in this Company Disclosure Schedule are for convenience of reference only and shall not be deemed to modify or influence the interpretation of the information contained in this Company Disclosure Schedule or the Agreement.

Terms defined in the Agreement and not otherwise defined in this Company Disclosure Schedule are used herein as defined in the Agreement. This information is disclosed in confidence for the purposes contemplated in the Agreement and is subject to the confidentiality provisions of the Agreement and any confidentiality agreement or non-disclosure agreement executed by the parties hereto relating to the transactions contemplated by the Agreement.

Shearman and Sterling LLP, have applied to the staff of the Securities and Exchange Commission requesting a waiver with respect to MLD's failure to file current reports on Form 8-K during 2007.

**Section 3.22**  
**Interested Party Transactions**

None.

**Section 5.1**  
**Conduct of Business**

See the disclosures set forth under Section 3.8 above relating to FDS, the Temasek closing and the \$70 billion facility, which are hereby incorporated by reference herein.

**Section 5.2**  
**Company Forbearances**

- 5.2 (a) and 5.2(d) - The Company may incur indebtedness (including the posting of appropriate collateral), even if outside the ordinary course of business, pursuant to the Primary Dealer Credit Facility and the Term Securities Lending Facility or any other facility established by a U.S. governmental entity.
- 5.2 (b)(ii) - Merrill Lynch & Co. Canada Ltd. may pay cash dividends on the Exchangeable Shares consistent with past practice (provided that such dividends may not be increased over the amount of the prior dividend) including record dates and payment dates consistent with the prior year, and may issue shares of Company Common Stock in connection with Exchangeable Shares as required pursuant to the terms of such Exchangeable Shares.
- 5.2(b)(iii) - The Company previously committed to make grants of equity awards (as previously disclosed in writing to Parent) to individuals who received offers of employment prior to the date of the Agreement from the Company or its Subsidiaries in an aggregate number of shares not in excess of (i) 3,721,521 with respect to individuals other than <sup>D&P Redaction</sup>

## D&P Redaction

D&P Redaction and excluding one of D&P Redaction grants, (ii) shares with a value of not in excess of \$12,500,000, in the aggregate, with respect to D&P Redaction

## D&P Redaction

D&P Redaction and (iii) shares with a value of \$20,000,000 with respect to one of D&P Redaction grants.

- 5.2(c) – Employees of the Company and its Subsidiaries may be provided the opportunity to amend their deferral elections under the deferred compensation plans of the Company and its

Subsidiaries previously identified by the Company to Parent in writing, in accordance with the transition election program previously described to Parent in writing and otherwise in accordance with Section 409A of the Code provided that such transition election program (i) does not increase the Company's costs, in other than an immaterial respect and (ii) is not applicable to any director or executive officer of the Company or any other member of the Company's Executive Management Team.

- 5.2(b)(iii), 5.2(c)(i) and 5.2 (c)(ii) - Variable Incentive Compensation Program ("VICP") in respect of 2008 (including without limitation any guaranteed VICP awards for 2008 or any other pro rata or other 2008 VICP awards payable, paid or provided to terminating or former employees) may be awarded at levels that (i) do not exceed \$5.8 billion in aggregate value (inclusive of cash bonuses and the grant date value of long-term incentive awards) less any 2008 incentive compensation value (other than any value in respect of any replacement cash or long-term incentive awards) in respect of the New Hire Cash Compensation Pool, and (ii) do not result in 2008 VICP-related expense exceeding \$4.5 billion, less any 2008 incentive compensation expense (other than any expense in respect of any replacement cash or long-term incentive awards) in respect of the New Hire Cash Compensation Pool. Sixty percent of the overall 2008 VICP shall be awarded as a current cash bonus and forty percent of the overall 2008 VICP shall be awarded as a long-term incentive award either in the form of equity or long-term cash awards. The form (i.e., equity v. long-term cash) and terms and conditions of the long-term incentive awards shall be determined by the Company in consultation with Parent, *provided* that in no event shall such long-term incentive awards contain acceleration or vesting rights (whether single or double trigger and including the rights provided in the applicable Company equity incentive plan) in connection with the Merger (except for any such rights applicable to equity awards granted in satisfaction of a 2008 VICP guarantee to the extent specifically required by the terms of an offer letter entered into prior to September 14, 2008) or any "good reason" termination feature (including vesting in connection with a "good reason" termination, except any good reason termination feature applicable to equity awards granted in satisfaction of a 2008 VICP guarantee to the extent specifically required by the terms of an offer letter entered into prior to September 14, 2008). The allocation of the 2008 VICP among eligible employees shall be determined by the Company in consultation with Parent.
- 5.2(c)(ii), 5.2(c)(iii) and 5.2 (c)(v) - The Company has extended offer letters which have not yet been accepted to the following individuals: (i) Graham Goldsmith; and (ii) Fjodor Duschek.
- 5.2 (c)(ii), 5.2(c)(iii) and 5.2(c)(v) - The Company and its Subsidiaries may: (i) hire employees whose individual annual cash compensation does not exceed \$3 million, subject to an annualized cash compensation limit for all such hired employees of up to \$100 million in the aggregate (the "New Hire Cash Compensation Pool"); and (ii) hire an unrestricted number of financial advisors in the ordinary course of business consistent with past practice and on terms that are consistent with past practice.
- 5.2 (c)(v) - The Company has entered into an agreement with Rohit D'Souza to terminate his employment as of September 30, 2008.

- 5.2(c)(v) - The Company and its Subsidiaries may implement employee terminations (i) pursuant to reductions in force relating to non-financial advisor global wealth management or global technology headcount, as previously discussed with Parent, (ii) as may be required by law or in connection with a violation of Company policies, or (iii) otherwise in consultation with Parent.
- 5.2(c)(vi) - The Company and its Subsidiaries may take actions for valid business purposes in the ordinary course of business with respect to employees in the position of Vice President or below (other than with respect to financial advisors) (and not systemic changes or changes impacting groups or categories of employees) that could constitute “good reason” with respect to the “good reason” triggers in the Company Benefit Plans relating to (x) positions and responsibilities and (y) relocation.
- 5.2(d) - Execution and delivery of definitive agreements by the Company and/or its affiliates, and consummation of the sale of a controlling interest in FDS.
- 5.2(n) - Subject to consultation in accordance with Section 6.13 of the Agreement, the proposed liquidation of a Subsidiary, pursuant to an election under Treasury Regulation Section 301.7701-3 (following its conversion from a public limited company (plc) to a limited company), as previously discussed between the Company and Parent, shall not require the prior written consent of Parent.

In the event the Company requests the consent of Parent required to take any action described in Section 5.2(a), 5.2(b)(iii) (provided that any such grants shall be made in consultation with Parent and shall not contain acceleration or vesting rights (whether single or double trigger and including the rights provided in the applicable Company equity incentive plan) in connection with the Merger or any “good reason” termination feature (including vesting in connection with a “good reason” termination), 5.2(d), 5.2(j)(i) (so long as there is no change of control provision that would be triggered by the Merger), 5.2(j)(ii) (but only to the extent that any such agreement or contract is in connection with an action contemplated by Section 5.2(d) of the Agreement) or 5.2(k) (so long as with respect to any proposed settlement for a single action or proceeding (or threatened action or proceeding), such settlement includes only monetary relief, does not involve an admission of guilt or wrongdoing and does not involve aggregate cash payments in excess of \$20 million) of the Agreement, Parent’s consent shall not be unreasonably withheld or delayed.

#### **Section 6.6** **Annual Premiums**

- D&P Redaction for D&O insurance (including a broker service fee).

## **Exhibit 21**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
-----

In Re BANK OF AMERICA CORPORATION C.A. No.  
STOCKHOLDER DERIVATIVE LITIGATION 4307-VCS  
-----

January 13, 2012  
9:05 a.m.

Videotaped deposition of NICHOLAS DEMMO, taken  
by Plaintiffs, pursuant to Subpoena, held at  
the offices of Horwitz Horwitz & Paradis LLP,  
570 Seventh Avenue, New York, New York, before  
Joseph R. Danyo, a Shorthand Reporter and Notary  
Public within and for the State of New York.

HUDSON REPORTING & VIDEO, INC.

124 West 30th Street, 2nd Fl.

New York, New York 10001

Tel: 212-273-9911 Fax: 212-273-9915

1 Demmo

2 the acquisition?

3 A. Yes.

4 Q. What was his role in the process of  
5 drafting the proxy statement?

6 A. You know, I don't remember. I just,  
7 I know he was one of the people that was  
8 involved.

9 Q. Was he working under your  
10 supervision?

11 A. Again we were all working on the  
12 proxy to get it done.

13 Q. You were a partner. He was an  
14 associate. Was he working under your  
15 supervision?

16 A. Yes.

17 Q. What was your role in preparing the  
18 proxy statement?

19 A. I was one of the lawyers who helped  
20 draft and review and finalize the proxy  
21 statement.

22 Q. Was anyone from Bank of America  
23 working on drafting the proxy statement?

24 A. Well, we were really doing the  
25 drafting. We would have sent it to Bank of

1 Demmo

2 America for their review and comments, but it is  
3 primarily a document driven by outside lawyers  
4 because it is describing the merger terms and  
5 whatnot, but obviously there are things you need  
6 from your client, from the other side.

7 Q. Who were you working with at Bank of  
8 America in the drafting process?

9 A. I mean I don't remember everyone.  
10 Teresa Brenner was the main person with whom we  
11 interfaced on those sorts of things.

12 Q. Who else?

13 A. I don't remember.

14 Q. Mr. Belk?

15 A. Probably not.

16 Q. Why do you say probably not?

17 A. You know, it is an SEC disclosure  
18 document. There is not a lot of financial  
19 information in it. Mr. Belk may have been  
20 involved if there was a particular question that  
21 he knew the answer to and others didn't, but it  
22 is not really a document that I would expect  
23 there would be things that he would be the only  
24 person who knew.

25 Q. Who at Wachtell on the Wachtell team



1 Demmo

2 A. In the discussions between the  
3 parties about the VICP, I was involved in that,  
4 yes, personally.

5 Q. Who on behalf of Bank of America  
6 decided to address the exception to the section  
7 5.2 negative covenant in a disclosure schedule?

8 MR. LIMAN: Objection to form.

9 MR. ANDERS: Objection to form.

10 Q. Do you recall that -- strike that  
11 question. There was an exception -- the merger  
12 agreement includes a negative covenant with  
13 respect to the payment of discretionary  
14 compensation, is that correct?

15 MR. LIMAN: Objection to form.

16 MR. ANDERS: Objection to form.

17 A. The merger agreement includes a  
18 negative covenant that relates to compensation  
19 generally, yes.

20 Q. Right, and it was decided to address  
21 an exception to that negative covenant in a  
22 disclosure schedule, correct?

23 MR. ANDERS: Objection to form.

24 MR. LIMAN: Objection to form.

25 A. Exceptions to negative covenants are

1 Demmo

2 typically in the disclosure schedule. I don't  
3 know that anyone had to make any specific  
4 decision, one, and, two, the VICP stuff wasn't  
5 worked out until five weeks after the merger  
6 agreement was done, so it would have been  
7 impossible to put it in the merger agreement.

8 Q. To your knowledge, did Wachtell  
9 provide any advice or counsel to Bank of America  
10 concerning where to address the exception to the  
11 negative covenant?

12 A. Why would we? That is the kind of  
13 disclosure that goes in the disclosure schedule.

14 Q. So is that answer yes or no?

15 MR. LIMAN: Objection to the form.

16 A. My answer is there is no specific  
17 advice or discussion about where it should go.  
18 It was one of those things that everyone involved  
19 in the deal would have said or any other deal  
20 would have said, of course, it goes in the  
21 disclosure schedules.

22 Q. And the disclosure schedules weren't  
23 finalized at the time of the merger agreement,  
24 correct?

25 A. Correct.

## **Exhibit 22**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

1 IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

2

3

4 IN RE: BANK OF AMERICA C.A. No. 4307-CS

5 CORPORATION STOCKHOLDER

6 DERIVATIVE LITIGATION

7

8

9 VIDEOTAPED DEPOSITION OF TIMOTHY J. MAYOPOULOS

10

11 DATE TAKEN: DECEMBER 22, 2011

12 TIME: 9:01 a.m.

13 LOCATION: James, McElroy & Diehl

600 South College Street

14 Charlotte, North Carolina

15 TAKEN BY: Counsel for the Plaintiff

16 REPORTED BY: CINDY A. HAYDEN, RMR, CRR

17 VIDEOGRAPHER: LEN HARRIS

18

19

20

21

22 HUDSON REPORTING & VIDEO, INC.

23 124 West 30th Street, 2nd Fl.

24 New York, New York 10001

25 Tel: 212-273-9911 Fax: 212-273-9915

1           Q.    In your experience as general counsel  
2   at Bank of America, was the board typically -- the  
3   board of Bank of America typically given the proxy  
4   statement to approve its contents before it's  
5   mailed?

6                   MR. LOWENTHAL:  Objection to the form.

7                   THE WITNESS:  I don't recall whether  
8   the board was typically -- whether that typically  
9   happened with the board or not.

10   BY MR. KRINER:

11           Q.    What was --

12           A.    And I don't know whether the board  
13   received a draft of this before it was filed or  
14   not.  I just don't recall.

15           Q.    Did you have any role in the contents  
16   of the proxy statement?

17           A.    My role was to make sure we had the  
18   right people working on it, Wachtell and people on  
19   my staff, as well as to review a draft of this  
20   document before it was filed, which I did.  And I  
21   focused on certain parts of it that I thought I had  
22   some particular knowledge or expertise about,  
23   but -- so I -- that was my role in connection with  
24   preparing the document.

25           Q.    Was there someone at or on behalf of

1 Bank of America who was primarily in charge with  
2 assembling the contents of the proxy statement?

3 A. Well, the proxy statement is typically  
4 drafted by the outside counsel for the company, in  
5 this case Wachtell Lipton. They're highly  
6 experienced and knowledgeable about what proxy  
7 statements are supposed to contain. And they draft  
8 it. It's obviously a joint document between Bank  
9 of America and Merrill Lynch. So Shearman &  
10 Sterling, another well-known law firm, was also  
11 involved in preparing and drafting the proxy  
12 statement. So the two law firms together do the  
13 primary drafting and collection of information, but  
14 obviously, as I said earlier, there are lots of  
15 people who are involved in contributing information  
16 that ends up being reported in the proxy statement.

17 Q. Was there a procedure or process in  
18 place for engaging the board concerning the  
19 contents of the proxy statement?

20 A. Not that I recall.

21 Q. Do you have any knowledge concerning  
22 communications between Wachtell and Fox-Pitt Kelton  
23 concerning the language of the Fox-Pitt fairness  
24 opinion letter to be disclosed in the proxy  
25 statement?

## **Exhibit 23**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

---

**From:** <RAFieldston@wlrk.com>  
**Sent:** Saturday, September 20, 2008 2:23 AM  
**To:** <teresa.brenner@bankofamerica.com>; <jonathan\_santelli@ml.com>;  
<speteplece@shearman.com>; <anoreuil@shearman.com>;  
<Craig.Culbert@Shearman.com>  
**Cc:** <NGDemmo@wlrk.com>; <MGuest@wlrk.com>; <JDCuneo@wlrk.com>  
**Subject:** Draft BAC MER S-4/Proxy

Attached, please find a draft of the S-4/Proxy. In the interest of time, we are distributing this simultaneously to both Bank of America and Merrill. This draft remains subject to continued review and comment by our client. We would appreciate your comments on this draft by 12:00pm on Tuesday, with the goal of filing by mid-week. Thanks.

Ross A. Fieldston  
Wachtell, Lipton, Rosen & Katz  
51 West 52nd Street  
New York, NY 10019-6150  
(212) 403-1340 (Tel.)  
(212) 403-2340 (Fax)  
**Redacted** (Mobile)



Draft S-4 BAC and  
MER.DOC

- Draft S-4 BAC and MER.DOC



## **Exhibit 24**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

---

**From:** Craig Culbert  
**Sent:** Wednesday, September 24, 2008 8:17 AM  
**To:** richard\_alsop@ml.com; judy\_witterschein@ml.com; cara\_londin@ml.com; jonathan\_santelli@ml.com; Pia\_Thompson@ml.com; Mason\_Reeves@ml.com; Joanne\_Tsung@ml.com; margaret\_nelson@ml.com; gale\_chang@ml.com; elizabeth\_mcclure@ml.com  
**Cc:** John J Madden; John A Marzulli Jr; Scott D Petepiece; Andrew J Noreuil; Margaret J. Davidson  
**Subject:** FW: Draft BAC MER S-4 / Proxy  
**Attachments:** 5-DVComparison\_NYDOCS02-#852641-v1-MER\_BAC\_S-4\_Draft-NYDOCS02-#852641-v3-MER\_BAC\_S-4\_Draft.doc; 6-NYDOCS02-#852641-v3-MER\_BAC\_S-4\_Draft.DOC

All,

Please see below. The revised draft S-4 has been sent to WLRK.

Best regards,

Craig Culbert

Shearman & Sterling LLP  
599 Lexington Avenue  
New York, NY 10022  
D +1.212.848.7653 | F +1.212.646.7653  
[craig.culbert@shearman.com](mailto:craig.culbert@shearman.com)

**From:** Craig Culbert  
**Sent:** Wednesday, September 24, 2008 4:09 AM  
**To:** NGDemmo@wlrk.com; MGuest@wlrk.com; JDCuneo@wlrk.com  
**Cc:** John J Madden; John A Marzulli Jr; Scott D Petepiece; Andrew J Noreuil; Robert Katz; Margaret J. Davidson; Gaurav Sud  
**Subject:** Draft BAC MER S-4 / Proxy

Redacted

Craig Culbert

Shearman & Sterling LLP  
599 Lexington Avenue  
New York, NY 10022  
D +1.212.848.7653 | F +1.212.646.7653  
[craig.culbert@shearman.com](mailto:craig.culbert@shearman.com)



## **Exhibit 25**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

---

**From:** Cuneo, James D.  
**Sent:** Wednesday, October 01, 2008 1:44 AM  
**To:** Bank of America/Merrill Lynch - WLRK Team - Internal (03144-0044)  
**Subject:** FW: Revised BAC MER S-4 / Proxy

**Attachments:** BCH15211BNY007\_BITS\_N\_CPO\_0028\_BAC.pdf; BCH15211BNY007\_BITS\_C\_CPO\_0035\_BAC.pdf



BCH15211BNY007\_BCH15211BNY007\_  
BITS\_N\_CPO\_0028..BITS\_C\_CPO\_0035..  
FYI

---

**From:** Cuneo, James D.  
**Sent:** Wednesday, October 01, 2008 1:40 AM  
**To:** Bank of America - Merrill Lynch & Co. - BAC Xternal (90000-0007)  
**Cc:** Demmo, Nicholas G.; Guest, Matthew M.; Fieldston, Ross A.  
**Subject:** Revised BAC MER S-4 / Proxy

Attached are clean and marked proofs of the revised S-4/Proxy. We expect to file Wednesday afternoon, so please send any final comments as early as possible.

Thank you,  
James

James D. Cuneo  
Wachtell, Lipton, Rosen & Katz  
51 West 52nd Street  
New York, N.Y. 10019-6150  
Phone: (212) 403-1116  
Fax: (212) 403-2116  
HYPERLINK "mailto:jdcuneo@wlrk.com"jdcuneo@wlrk.com

## **Exhibit 26**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

Jeannemarie O'Brien

November 20, 2009

CONFIDENTIAL

Page 1

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-vs-

09-CV-6829

BANK OF AMERICA,

Defendant.  
-----

C O N F I D E N T I A L

VIDEOTAPED DEPOSITION OF

JEANNEMARIE O'BRIEN, the witness herein,  
taken at the offices of the Securities and  
Exchange Commission, 3 World Financial  
Center, New York, New York, pursuant to  
Subpoena, on Friday, November 20, 2009 at  
9:40 a.m., before Linda Salzman, a Shorthand  
Reporter and notary public, within and for  
the State of New York.

Jeannemarie O'Brien

November 20, 2009

CONFIDENTIAL

Page 118

1 J. O'Brien - Confidential

2 worked out, I think were more along the  
3 detail line.

4 Q. Did you have any understanding that  
5 the merger agreement references -- when the  
6 merger agreement was signed on September  
7 14th, I believe, or September 15th, that  
8 there were references to the disclosure  
9 schedule?

10 A. Yes.

11 Q. At that point, did the disclosure  
12 schedule exist?

13 MR. LIMAN: Objection to form.

14 A. I don't know if I received a hard  
15 copy at some point over the weekend, but I  
16 know that the first record of an electronic  
17 copy being sent to me was sometime Monday,  
18 early morning.

19 Q. Do you know when Mr. Lewis and  
20 Mr. Thain signed the merger agreement, do you  
21 know whether they received a copy of the  
22 disclosure schedule?

23 MR. ANDERS: Objection to form and  
24 foundation.

25 A. No, I would imagine the disclosure



Jeannemarie O'Brien

November 20, 2009

CONFIDENTIAL

Page 119

1 J. O'Brien - Confidential

2 schedule is something they did not receive at  
3 whatever time they signed on Sunday night.

4 Q. Why do you think that?

5 A. I don't think it would be something  
6 that you would typically ask a CEO to review,  
7 and I don't believe it was finalized.

8 Q. So ordinarily the disclosure  
9 schedule would not be appended to the merger  
10 agreement when it's being executed?

11 A. No. It's something that can be  
12 worked out and, you know, people have a  
13 general, you know, they normally like to have  
14 a general idea what they say, but here we  
15 were in, you know, we didn't. We were  
16 waiting to get them and we got them when we  
17 got them.

18 Q. And then turning to the black-lined  
19 attachment relating to Section 5.2, if you  
20 see the fourth bullet point, it's struck out  
21 in its entirety, that bullet point reads,  
22 "VICP for 2008 (at 2007 level) on terms  
23 agreed by the parties."

24 Do you have an understanding of why  
25 this was struck out in its entirety?

## **Exhibit 27**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x )  
IN RE BANK OF AMERICA )  
CORP. SECURITIES, )  
DERIVATIVE AND ) Master File No.  
EMPLOYMENT RETIREMENT )  
INCOME SECURITY ACT ) 09-MD-2058(PKC)  
(ERISA) LITIGATION )  
-----x )  
THIS DOCUMENT RELATES TO )  
All Securities Actions )  
-----x )  
IN THE COURT OF )  
CHANCERY OF THE STATE OF )  
DELAWARE )  
C.A. No. 4307-CS )  
-----x )  
IN RE BANK OF AMERICA )  
CORPORATION STOCKHOLDER )  
DERIVATIVE LITIGATION )  
-----x )

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP  
1285 AVENUE OF THE AMERICAS  
NEW YORK, NEW YORK  
MARCH 16, 2012  
8:40 A.M.

CONTINUED VIDEOTAPED DEPOSITION OF  
NEIL ANDREW COTTY

Reported by:  
DEBRA SAPIO LYONS, RDR, CRR, CCR, CPE

Page 198

1 Neil A. Cotty - Confidential

2 Q. And this is a forecast for 08:58:21

3 Merrill Lynch's fourth quarter results 08:58:23

4 of operations; is that correct? 08:58:26

5 A. That would be correct. 08:58:27

6 Q. And do you recall being sent 08:58:31

7 a forecast for the fourth quarter prior 08:58:35

8 to November 12th, 2008? 08:58:37

9 A. I believe this is the first 08:58:43

10 forecast I received with regard to the 08:58:49

11 first quarter -- fourth quarter of 08:58:52

12 2008. 08:58:54

13 Q. And do you recall having any 08:58:54

14 discussions prior to November 12th, 08:58:55

15 2008 concerning the expectations for 08:59:00

16 Merrill Lynch's fourth quarter 08:59:01

17 performance? 08:59:03

18 A. No, I do not. 08:59:03

19 Q. And what is the estimate, 08:59:08

20 sir, for the fourth quarter 2008 pretax 08:59:13

21 earnings on this page? 08:59:15

22 A. On Line 36, fourth quarter 08:59:16

23 pretax earnings for the fourth quarter 08:59:25

24 of 2008 I believe is 8 billion 942 08:59:28

25 million. 08:59:31

Page 328

1 Neil A. Cotty - Confidential

2 Q. And you say, "Further, 13:23:00  
3 December may take some further hits. 13:23:04  
4 Turning a profit in December may prove 13:23:07  
5 to be challenging." 13:23:09

6 Why did you expect December 13:23:11  
7 to take some further hits as of 13:23:12  
8 December 3rd, 2008? 13:23:17

9 A. Um. I don't recall why I 13:23:18  
10 said that, made that statement. 13:23:27

11 Q. Do you recall why you made 13:23:28  
12 the statement "turning a profit in 13:23:33  
13 December may prove to be challenging?" 13:23:35

14 A. No, I do not, but supports 13:23:43  
15 my December forecast placeholder that I 13:23:46  
16 had last time. I don't know why. I 13:23:49  
17 imagine I had some rationale. I just 13:23:52  
18 don't recall the reason. 13:23:53

19 Q. Did Mr. Thain respond to 13:23:54  
20 your e-mail, do you know, sir? 13:23:59

21 A. No, I don't recall a 13:24:00  
22 response to the e-mail. 13:24:05

23 Q. Do you have a call with Mr. 13:24:07  
24 Thain concerning the fourth quarter '08 13:24:11  
25 pacing and forecast and the 2009 plan 13:24:15

Page 329

1 Neil A. Cotty - Confidential

2 on December 3rd, 2008? 13:24:18

3 A. Yes, I believe it was later 13:24:20

4 that evening with others in the room. 13:24:23

5 Q. And who else was there? 13:24:25

6 A. Um. In the room would have 13:24:27

7 been John Thain, myself, Nelson Chai. 13:24:30

8 And when I say in the room, it would 13:24:34

9 have been at Merrill Lynch's corporate 13:24:36

10 offices, so we were in the room. In 13:24:39

11 Charlotte would have been Ken Lewis and 13:24:42

12 Joe Price. 13:24:45

13 Q. And -- and why was this call 13:24:45

14 being held on December 3rd, 2008? 13:24:50

15 A. Um. Joe called the meeting 13:24:51

16 or wanted to have the meeting, or I 13:24:56

17 don't know if were Joe or Ken, but, 13:24:58

18 again, I assume it was to review 13:25:03

19 both -- both the 2008 forecast and 2009 13:25:05

20 plan which are attached. 13:25:08

21 Q. And during this call, sir, 13:25:08

22 did you explain your expectations for 13:25:14

23 the fourth quarter at Merrill Lynch as 13:25:20

24 of December 3rd, 2008? 13:25:24

25 A. Um. The way the meeting ran 13:25:26

1 Neil A. Cotty - Confidential

2 to my recollection is we went through 13:25:35

3 this December 3rd forecast and either 13:25:36

4 Ken or Joe asked me to walk through it, 13:25:41

5 and, you know, I did the sort of the 13:25:44

6 elevator speech of what was behind some 13:25:47

7 of the numbers, driving some of the 13:25:54

8 numbers. And so that was my role, was 13:25:56

9 to go through the document on Page 2 of 13:25:59

10 the forecasting. And I would have 13:26:01

11 flipped to some of the relevant 13:26:04

12 attachments in support of the 13:26:06

13 discussion such as Page 3, but 13:26:08

14 that's -- that's what I did with regard 13:26:13

15 to 2008. 13:26:14

16 Q. And did you discuss your 13:26:15

17 placeholder of a billion dollars for 13:26:21

18 November 2008? 13:26:26

19 A. Um. I believe the way it 13:26:26

20 was discussed or came up, and Ken 13:26:30

21 asked, you know, how do you feel, Neil, 13:26:33

22 was -- about this forecast, and I 13:26:37

23 believe at the time I gave him a range 13:26:39

24 of I could see anywhere from 1 billion 13:26:42

25 to 3 billion downside to this number. 13:26:44

1 Neil A. Cotty - Confidential

2 Q. And when you say "downside 13:26:48  
3 to this number," you mean the quarterly 13:26:49  
4 estimate or the November estimate? 13:26:51

5 A. I was solely focused I 13:26:53  
6 believe at the time on the 11 billion 13:26:55  
7 043 and, you know, thinking there could 13:26:57  
8 be another billion to -- to 3 billion 13:26:59  
9 on that number, the low side being the 13:27:00  
10 billion of the CVA wild -- WAG, and 3 13:27:04  
11 billion a -- a more conservative range 13:27:09  
12 if you will. So that was the range 13:27:16  
13 that I presented to the group, 1 to 3. 13:27:18

14 Q. So it would be the 11 13:27:21  
15 billion presented here on Page 2 of the 13:27:27  
16 forecast plus an additional 1 to 3 13:27:32  
17 billion? 13:27:35

18 A. That's correct. 13:27:35

19 Q. What was Mr. Thain's 13:27:35  
20 reaction to your opinion of the fourth 13:27:40  
21 quarter 2008? 13:27:45

22 A. Um. When I -- when I put 13:27:45  
23 the 1 to 3 billion out he -- I don't 13:27:52  
24 recall the reaction. And then I think 13:27:55  
25 we were going to go on to 2009 and Ken 13:28:04



## **Exhibit 28**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

**From:** Meloth, Nancy (Corporate Planning) <nancy\_meloth@ml.com>  
**Sent:** Wednesday, November 12, 2008 11:49 PM (GMT)  
**To:** Cotty, Neil <neil.cotty@bankofamerica.com>  
**Cc:** Hayward, Christopher (Finance Director) <christopher\_hayward@ml.com>, Carlin, Gary (Corporate Controller) <gary\_carlin@ml.com>  
**Subject:** 4Q forecast  
**Attach:** fcstasof111208 ( Summary for Neil) v2.xls;firm e2a summary 111108.xls

---

Neil:

4Q forecast. Please note a few things:

Treasury does not have a balance sheet target for 4Q – either stand alone or in conjunction with BAC partners

We have populated current bal sheet assets on the attached but not a qtr end forecast. Let us know if you want us to follow up on this with Treasury.

The "bal to go" for Nov/Dec assumes no additional marks, cva, fva or other significant market dislocation items for balance of quarter.

<<fcstasof111208 ( Summary for Neil) v2.xls>>

Attached also is the e2a for month of October vs what we should you and Joe last Friday

<<firm e2a summary 111108.xls>>

Please advise if you have any questions

---

This message w/attachments (message) may be privileged, confidential or proprietary, and if you are not an intended recipient, please notify the sender, do not use or share it and delete it. Unless specifically indicated, this message is not an offer to sell or a solicitation of any investment products or other financial product or service, an official confirmation of any transaction, or an official statement of Merrill Lynch. Subject to applicable law, Merrill Lynch may monitor, review and retain e-communications (EC) traveling through its networks/systems. The laws of the country of each sender/recipient may impact the handling of EC, and EC may be archived, supervised and produced in countries other than the country in which you are located. This message cannot be guaranteed to be secure or error-free. This message is subject to terms available at the following link: [http://www.ml.com/e-communications\\_terms/](http://www.ml.com/e-communications_terms/). By messaging with Merrill Lynch you consent to the foregoing.

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15						2008 4Q & FY Forecast		
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1	Merrill Lynch & Co.																												
2	4Q'08 Forecast																												
3																													
4																													
5	Revenue ex Marks/FVA/One-Time	4Q07	3Q08					Oct Acr (25 days)	Nov MTD (7 days)			4Q08 Forecast																	
6												QTD Estimate	BTG	4Q08F															
7	FICC	854	628					(1,389)	160			(1,230)	249	(980)															
8	Equity	1,653	1,388					1,037	58			1,095	555	1,850															
9	IBK	1,080	571					102	41			143	508	652															
10	GPID	298	(315)					(296)	(120)			(418)	(184)	(900)															
11	GMI Other	(180)	136					67	(8)			58	(118)	(60)															
12	GMI	3,704	2,389					(479)	130			(349)	1,011	862															
13																													
14	GPC	3,414	2,933					1,094	329			1,423	1,574	2,997															
15	GIM	151	88					(18)	15			(3)	49	46															
16	GWM	3,664	3,021					1,076	344			1,421	1,522	3,043															
17																													
18	Corporate	(72)	287					532	(13)			519	(544)	(125)															
19	ML&Co ex Marks/FVA/One-Time	7,196	5,697					1,130	461			1,590	1,989	3,580															
20	Significant Items (Non-Marks)	-	2,133					(2,619)	-			(2,619)	-	(2,619)															
21	Total Marks	(16,718)	(10,656)					(2,720)	-			(2,720)	-	(2,720)															
22	FVAs	1,331	2,842					(1,078)	(8)			(1,088)	-	(1,088)															
23	Total Marks/Significant Items	(15,387)	(5,581)					(6,417)	(8)			(6,424)	-	(6,424)															
24																													
25	Total Revenue	(8,192)	16					(5,287)	463			(4,834)	1,989	(2,844)															
26																													
27	Comp	3,021	2,725					1,051	310			1,361	1,772	2,823															
28	Non Comp	2,335	1,819					612	248			860	1,509	2,211															
29	VICP	1,318	758					495	122			617	477	972															
30	Total Expenses ex One-Time	6,678	6,302					2,168	680			2,838	3,848	5,006															
31																													
32	FF/ARS	54	425					92				92	-	92															
33	Restructuring	-	40					(1)				(1)	1	-															
34	Temasek	-	2,500					-				-	-	-															
35																													
36	PTE	(14,920)	(6,251)					(7,536)	(227)			(7,763)	(1,859)	(8,942)															
37																													
38	Taxes	(4,823)	(3,132)					(3,000)	(60)			(3,060)	(559)	(3,559)															
39																													
40	ML Operating ATE	(10,297)	(5,119)					(4,536)	(137)			(4,673)	(1,300)	(5,383)															
41																													
42	All In Results:																												
43	EPS	\$ (12.57)	\$ (5.56)											\$ (3.48)															
44	ROE	(131.5%)	(107.5%)											#DIV/0!															
45	Pre-Tax Margin	NM	NM											NM															
46	Comp Ratio	NM	NM											NM															
47	Non Comp Ratio	NM	NM											NM															
48	Tax Rate	31.0%	38.0%					39.8%						39.8%															
49																													
50	Ex Marks/FVA/One-Time Results																												
51	Revenue	7,196	5,697					1,130					1,859	3,580															
52	PTE	521	395					(1,028)					(1,859)	(2,426)															

	A	B	C	D	E	F	G	H	I	J	K	L	M	P	O	T	W	Y	Z	AB	AC
53	ATE		362		274			(714)						(1,280)		(1,584)		-714%		-566%	
54	EPS		\$ 0.28		\$ 0.15											\$ (1.97)		\$ (2.12)		\$ (2.26)	
55	Preferred Dividends		107		107											107					
56	Mandatory		38		149											149					
57	Net to Common EPS		254		167											(1,940)					
58	Common Shares		825		984											984					
59	Diluted Shares		895		1,144											1,144					
60																					
61	Preferred Dividends		73		107											107					
62	Mandatory		-		2,212											38					
63	Net to Common EPS		(10,369)		(7,438)											(5,528)					
64	Net to Common ROE		(10,369)		(7,438)											(5,528)					
65	Common Shares		625		1,339											1,599					
66	Diluted Shares		895		1,446											1,679					
67	Average Common Equity		31,541		27,683																
68																					
69	Common Equity		27,549		29,750																
70	Preferred Stock		4,363		8,905																
71	Trust Preferred Securities		4,725		4,778																
72	Equity Capital		36,637		43,428																
73																					
74	Total Assets		1,020,050		875,780			882,100	est		884,199	est				TBD					
75	Adjusted Assets		847,343		572,385			574,900	est		581,143	est				TBD					
76																					

	A	D	K	L	M	N	O	P	Q
1	Merrill Lynch & C								
2	ML&CO Pacing (Internal								
3									
4									
5									
6									
7	Revenue ex Marks/FVA/One-Time								
8									
9	Global Rates and Currencies	1,174	18	3,634	19				
10	Credit	(224)	(3)	116	1				
11	CPI	(59)	(1)	186	1				
12	Global Principal Credit Group	(244)	(4)	(651)	(3)				
13	Municipal Products	30	0	224	1				
14	Global Structured Finance & Inv	54	1	27	0				
15	Global Mortgages	(24)	(0)	425	2				
16	ML BUSA Investment Portfolio	(3)	(0)	(242)	(1)				
17	Global Commercial Real Estate	1	0	2	0				
18	Commodities	184	3	659	3				
19	Global Prop Trading	5	0	540	3				
20	FICC Management	(264)	(4)	(153)	(1)				
21	FICC	628	10	4,788	24				
22									
23	Cash	649	10	2,064	11				
24	Equity Linked	417	6	1,190	6				
25	Equity Financing & Services	310	5	1,128	6				
26	Strategic Risk Group	49	1	200	1				
27	Alternative Investment	(39)	(1)	(90)	(0)				
28	Equity Management	(17)	(0)	132	1				
29	Equity	1,368	21	4,823	24				
30									
31	IBK	571	9	2,280	12				
32									
33	GPID	(316)	(6)	(373)	(3)				
34									
35	Other GMI	136	2	(374)	(2)				
36									
37	Total GMI	2,389	37	10,922	58				
38									
39	GPC	2,933	45	9,448	48				
40	GIM	88	1	325	2				
41	GWM	3,021	46	9,773	50				
42									
43	Corporate	287	4	(122)	(1)				
44									
45	Total ML&CO ex Marks ex One-Time <sup>(1)</sup>	6,697	88	20,572	105				
46									
47	Core Marks	(2,482)		(18,733)					
48	One-Time Marks	(8,175)		(8,175)					
49	Significant Items (Non-Marks)	2,133		2,133					

	R	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE	AF	AG	AH	AI	AJ	AK	AL	AM	AN
1	Basis																						
2																							
3																							
4																							
5	4Q08 Pacing											4Q'08F				FY'08F							
6	Oct Act (25 days)	Nov MTD (7 days)	QTD Est (32 days)	Daily Avg (32 days)	8TG	Daily Avg (33 days)						4Q'08F	Daily Avg (65 days)					FY'08F	Daily Avg (260 days)				
7																							
8																							
9	510	164	674	21	396	12						1,070	16					4,704	18				
10	(819)	(35)	(854)	(27)	(91)	(3)						(945)	(15)					(829)	(3)				
11	(227)	(15)	(242)	(8)	(8)	(0)						(250)	(4)					(64)	(0)				
12	(126)	(2)	(128)	(4)	(192)	(5)						(320)	(5)					(971)	(4)				
13	(30)	2	(28)	(1)	(7)	(0)						(36)	(1)					188	1				
14	(21)	(0)	(21)	(1)	81	2						60	1					87	0				
15	8	(0)	8	0	(238)	(7)						(230)	(4)					195	1				
16	51	(15)	35	1	(10)	(0)						28	0					(217)	(1)				
17	10	(1)	9	0	56	2						65	1					67	0				
18	277	95	372	12	63	2						435	7					1,094	4				
19	(726)	7	(719)	(22)	(66)	(2)						(785)	(12)					(245)	(1)				
20	(296)	(40)	(336)	(11)	266	8						(70)	(1)					(223)	(1)				
21	(1,389)	160	(1,230)	(38)	249	8						(980)	(15)					3,786	16				
22																							
23	259	64	323	10	307	9						630	10					2,694	10				
24	694	(37)	658	21	167	5						825	13					2,015	8				
25	121	25	146	5	89	3						235	4					1,363	5				
26	18	8	25	1	14	0						40	1					240	1				
27	(7)	3	(4)	(0)	4	0						-	-					(90)	(0)				
28	(48)	(6)	(54)	(2)	(26)	(1)						(80)	(1)					52	0				
29	1,037	68	1,095	34	558	17						1,850	25					6,273	24				
30																							
31	102	41	143	4	509	15						852	10					2,932	11				
32																							
33	(298)	(120)	(418)	(13)	(184)	(8)						(600)	(8)					(973)	(4)				
34																							
35	67	(8)	58	2	(118)	(4)						(60)	(1)					(434)	(2)				
36																							
37	(479)	130	(349)	(11)	1,011	31						882	10					11,584	45				
38																							
39	1,094	329	1,423	44	1,574	48						2,997	46					12,445					
40	(18)	15	(3)	(0)	49	1						46	1					371					
41	1,076	344	1,421	44	1,822	49						3,043	47					12,816	49				
42																							
43	532	(13)	519	16	(844)	(20)						(125)	(2)					(247)	(1)				
44																							
45	1,130	461	1,590	50	1,989	60						3,580	55					24,152	93				
46																							
47	(2,720)	-	(2,720)	-	-	-						(2,720)	-					(21,453)	-				
48		-	-	-	-	-							-					(8,175)	-				
49	(2,619)	-	(2,619)	-	-	-						(2,619)	-					(486)	-				

	A	D	K	L	M	N	O	P	Q
50	FVAs		2,842			5,036			
51	Total Marks/Significant Items		(6,681)			(19,739)			
52									
53	Total ML&CO Revenue		16	0		834	4		
54									
55	Excludes Marks, FVA and One-Time items including Freddie / Fannie, Project NOW, CDO sale / Mordine termination, Bloomberg gain on sale								
56	and other market dislocations. 4Q06 excludes ML CDS MTM exposure against Sigma-collateralized CLNs								



	R	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE	AF	AG	AH	AI	AJ	AK	AL	AM	AN
50	(1,078)		(8)		(1,086)				-					(1,086)						3,950			
51	(6,417)		(8)		(6,424)				-					(6,424)						(26,163)			
52																							
53	(5,287)		453		(4,834)		(151)	1,989			60			(2,844)		(44)				(2,011)		(8)	
54																							
55																							
56																							

	A	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	Y	Z	AA	AB	AC
1																					
2																					
3																					
4																					
5	\$ in millions																				
6																					
7	Net Revenue ex Marks ex One-Time																				
8	FICC	7,974	2,949	2,557	1,859	854	8,218	2,056	2,082	628	(980)										
9	Non-Marks One-Time Items	-	-	-	-	-	-	-	-	(1,860)	(2,215)										
10	One-Time Marks	-	-	-	-	-	-	-	-	(8,274)	-										
11	Core Marks	-	(251)	(147)	(8,158)	(16,797)	(25,353)	(6,138)	(9,571)	(2,121)	(2,319)										
12	Total FICC Marks	-	(251)	(147)	(8,158)	(16,797)	(25,353)	(6,138)	(9,571)	(10,395)	(2,319)										
13	Total FICC	7,874	2,698	2,409	(6,300)	(16,943)	(17,135)	(4,083)	(7,486)	(11,727)	(6,605)										
14	Equity	4,842	1,646	1,823	1,353	1,653	6,474	1,503	1,752	1,368	1,650										
15	Non-Marks One-Time Items	-	-	-	-	-	-	-	-	(47)	(322)										
16	Total Equity	4,842	1,646	1,823	1,353	1,653	6,474	1,503	1,752	1,322	1,328										
17	IBK	3,735	1,292	1,389	1,090	1,090	4,852	751	957	571	652										
18	One-Time Marks	-	-	-	-	-	-	-	-	-	(181)										
19	Core Marks	-	-	-	(301)	(311)	(382)	(603)	(126)	(355)	(363)										
20	IBK	3,735	1,292	1,389	789	898	4,469	149	781	217	108										
21	GPID	2,762	624	383	541	298	1,845	86	(144)	(315)	(600)										
22	Non-Marks One-Time Items	-	-	-	-	-	-	-	-	4,208	(30)										
23	Core Marks	-	226	188	(26)	160	549	113	(5)	(27)	(92)										
24	GPID	2,762	850	572	515	457	2,384	199	(160)	3,864	(722)										
25	Other GMI	(830)	(233)	(321)	(150)	(180)	(885)	(293)	(218)	139	(60)										
26	GMI	18,384	6,278	5,831	4,692	3,704	20,505	4,103	4,430	2,399	862										
27	Non-Marks One-Time Items	-	-	-	-	-	-	-	-	2,199	(2,748)										
28	One-Time Marks	-	-	-	-	-	-	-	-	(8,274)	-										
29	Core Marks	-	(25)	42	(8,485)	(16,718)	(25,187)	(6,629)	(9,803)	(2,504)	(2,765)										
30	Total GMI Marks	-	(25)	42	(8,485)	(16,718)	(25,187)	(6,629)	(9,803)	(10,777)	(2,765)										
31	GMI "All In"	18,384	6,253	5,872	(3,793)	(13,015)	(4,662)	(2,526)	(5,373)	(6,199)	(4,861)										
32	GPC	11,476	3,133	3,332	3,341	3,414	13,219	3,349	3,186	2,933	2,997										
33	One-Time Marks	-	-	-	-	-	-	-	-	99	-										
34	Core Marks	-	-	-	-	-	-	49	132	22	45										
35	Total GPC Marks	-	-	-	-	-	-	49	132	121	45										
36	Total GPC	11,476	3,133	3,332	3,341	3,414	13,219	3,398	3,297	3,054	3,042										
37	GIM	111	127	175	148	151	600	162	75	88	46										
38	GWM	11,886	3,280	3,507	3,489	3,584	13,820	3,511	3,241	3,021	3,043										
39	One-Time Marks	-	-	-	-	-	-	-	-	89	-										
40	Core Marks	-	-	-	-	-	-	49	132	22	45										
41	Total GWM Marks	-	-	-	-	-	-	49	132	121	45										
42	GWM "All In"	11,886	3,280	3,507	3,489	3,584	13,820	3,560	3,372	3,142	3,098										
43	MLIM	1,861	1	0	0	(1)	1	0	0	(0)	-										
44	Corporate	(19)	99	63	74	(72)	153	(203)	(206)	287	(126)										
45	Non-Marks One-Time Items	-	-	-	-	-	-	-	-	(60)	129										
46	Corporate FVAs	-	(9)	28	609	1,331	1,959	2,103	91	2,842	(1,086)										
47	Corporate "All In"	(19)	90	81	683	1,259	2,112	1,899	(116)	3,063	(1,082)										
48	ML&GO ex Marks/FVA/One-Time	31,812	8,637	9,380	8,266	7,196	34,476	7,411	7,464	5,696	3,680										
49	Non-Marks One-Time Items	-	-	-	-	-	-	-	-	2,133	(2,619)										
50	FVAs	-	(9)	28	609	1,331	1,959	2,103	91	2,842	(1,086)										
51	One-Time Marks	-	-	-	-	-	-	-	-	(8,175)	-										
52	Core Marks	-	(25)	42	(8,485)	(16,718)	(25,187)	(6,580)	(9,871)	(2,482)	(2,720)										
53	Total Marks	-	(25)	42	(8,485)	(16,718)	(25,187)	(6,580)	(9,871)	(10,656)	(2,720)										
54	Total Marks/Significant Items	-	(34)	70	(7,879)	(15,387)	(23,228)	(4,477)	(9,580)	(5,691)	(6,424)										

	AD	AE	AF	AG	AH
1					
2					
3					
4					
5					
6	FY 2008F				
7					
8	3,766		(4,432)	(50.9%)	
9	(4,175)		(4,175)	NM	
10	(8,274)				
11	(20,141)				
12	(28,415)		(3,091)	-12.1%	
13	(28,804)		(11,688)	-88.1%	
14	6,273				
15	(388)				
16	5,904		(570)	-8.8%	
17	2,932		(1,920)	(39.6%)	
18	(181)				
19	(1,547)		(1,184)	NM	
20	1,204		(3,265)	-73.1%	
21	(973)		(2,818)	(152.7%)	
22	4,176				
23	(12)				
24	3,191		798	33.3%	
25	(434)		450	50.9%	
26	11,584		(8,921)	(43.5%)	
27	(549)				
28	(8,274)				
29	(21,700)				
30	(28,974)		(4,787)	(19.0%)	
31	(18,939)		(14,267)	NM	
32					
33	12,445		(774)	(5.9%)	
34	99				
35	247				
36	346		346	NM	
37	12,791		(428)	(3.2%)	
38	371		(230)	(38.3%)	
39	12,816		(1,004)	(7.3%)	
40	99				
41	247				
42	346		346	NM	
43	13,162		(658)	(4.8%)	
44					
45	(0)		(1)	(114.3%)	
46	(247)		(400)	NM	
47	63				
48	3,950		1,991	101.6%	
49	3,766		1,654	78.3%	
50					
51	24,162		(10,326)	(30.0%)	
52	(488)				
53	3,950				
54	(8,175)				
55	(21,453)				
56	(29,627)				
57	(26,163)				

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	A	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	Y	Z	AA	AB	AC
58	Total ML&CO Revenue	31,812		8,603		8,460		380		(8,192)		11,261		2,834		(2,116)		16		(1,844)	
59																					
60	GMI	3,219		1,054		1,084		1,128		1,275		4,539		1,581		1,107		1,128		1,210	
61	GWM	5,893		1,658		1,649		1,661		1,752		6,720		1,849		1,673		1,592		1,596	
62	MLIM	384		(0)		0		0		0		0		0		(0)		0		-	
63	Corporate	14		5		(10)		(6)		(6)		(17)		16		(9)		5		17	
64	Comp	8,320		2,717		2,723		2,781		3,021		11,242		3,448		2,771		2,726		2,823	
65																					
66	GMI Non Comp ex One-Time	3,853		1,123		1,217		1,284		1,517		5,140		1,243		1,333		1,141		1,432	
67	GMI Non Comp One-Time (FF)	-		-		-		110		54		184		-		-		-		-	
68	GMI	3,853		1,123		1,217		1,394		1,571		5,304		1,243		1,333		1,141		1,432	
69	GWM Non Comp ex One-Time	2,628		607		652		673		837		2,769		799		721		687		776	
70	GWM Non Comp One-Time	-		-		-		-		-		-		-		-		-		-	
71	GWM	2,628		607		652		673		837		2,769		799		721		687		776	
72	MLIM	466		0		0		(0)		(0)		0		0		(0)		0		(0)	
73	Corp Non Comp ex One-Time	99		118		33		(28)		(19)		106		(2)		5		(9)		4	
74	Corp Non Comp One-Time (ARS)	-		-		-		-		-		-		-		-		425		92	
75	Corporate	99		118		33		(28)		(19)		106		(2)		5		416		96	
76	Non Comp ex One-Time	7,047		1,848		1,902		1,930		2,335		8,014		2,040		2,059		1,819		2,211	
77	Non Comp One-Time	-		-		-		110		54		184		-		-		425		92	
78	Total Non Comp	7,047		1,848		1,902		2,040		2,389		8,178		2,040		2,059		2,244		2,303	
79																					
80	GMI	4,588		1,735		1,510		(835)		1,468		3,878		480		547		584		772	
81	GWM	834		223		239		220		85		767		200		219		163		204	
82	MLIM	264		0		(0)		0		0		0		0		0		-		-	
83	Corporate	(23)		179		260		(187)		(235)		16		70		(46)		8		(4)	
84	VICP	5,644		2,137		2,008		(982)		1,318		4,661		750		720		788		972	
85																					
86	Restructuring	-		-		-		-		-		-		-		445		40		-	
87	Temasek Payment	-		-		-		-		-		-		-		-		2,500		-	
88																					
89	Total Expenses ex One-Time	22,011		6,702		6,833		3,908		6,975		23,917		6,235		5,550		5,302		6,008	
90	Total Expenses	22,011		6,702		6,833		4,018		6,729		24,081		6,236		5,994		8,267		6,998	
91																					
92	GMI PTE ex Marks	6,743		2,367		2,020		3,117		(556)		6,948		799		1,443		(464)		(2,752)	
93	GMI	6,743		2,342		2,062		(5,478)		(17,328)		(18,403)		(5,820)		(8,360)		(9,042)		(8,264)	
94	GWM PTE ex Marks	2,431		771		967		938		890		3,564		664		626		573		467	
95	GWM	2,431		771		967		938		890		3,564		713		759		694		512	
96	MLIM	737		1		(0)		0		(1)		1		0		0		(0)		0	
97	Corporate PTE ex FVAs	(109)		(203)		(230)		294		188		48		(287)		(156)		286		(142)	
98	Corporate	(109)		(212)		(202)		903		1,519		2,007		1,615		(510)		97		(1,190)	
99	Pre-Tax Earnings ex Marks ex One-Time	9,801		2,935		2,757		4,348		520		10,581		1,176		1,915		395		(2,428)	
100	Pre-Tax Earnings	9,801		2,902		2,827		(3,538)		(14,921)		(12,831)		(3,301)		(8,110)		(8,261)		(8,942)	
101																					
102	Taxes ex Marks ex One-Time	2,633		898		844		1,330		159		3,232		380		588		121		(742)	
103	Taxes	2,633		871		817		(1,258)		(4,623)		(4,195)		(1,333)		(3,476)		(3,132)		(3,559)	
104																					
105	ML Operating ATE ex Marks ex One-Time	7,169		2,037		1,814		3,017		381		7,329		818		1,329		274		(1,684)	
106	ML Operating ATE	7,169		2,031		2,010		(2,380)		(10,298)		(8,636)		(1,856)		(4,534)		(5,120)		(5,389)	
107																					
108																					
109	ex Marks ex One-Time Results:																				
110	EPS	\$7.25		\$2.13		\$1.99		\$3.29		\$0.32		\$7.75		\$0.68		\$1.06		\$0.15		(\$1.97)	
111																					
112	ROE	20.3%		21.8%		19.8%		31.2%		3.4%		19.4%		10.8%		19.7%		2.3%		(26.7%)	
113																					
114	Pre-Tax Margin	30.8%		30.5%		29.4%		52.7%		7.2%		30.6%		15.9%		25.6%		6.9%		-67.8%	
115																					

	AD	AE	AF	AG	AH
58	(2,011)		(13,261)	(117.9%)	
59					
60	5,027		(487)	(10.7%)	
61	6,708		11	0.2%	
62	0				
63	28			NM	
64	11,765		(823)	(4.7%)	
65					
66	5,148		(8)	(0.2%)	
67					
68	5,148		155	2.8%	
69	2,982		(213)	(7.7%)	
70					
71	2,982		(213)	(7.7%)	
72	(0)		0	100.0%	
73	(3)		109	102.7%	
74	517				
75	514		(408)	NM	
76	8,128		(114)	(1.4%)	
77	517				
78	8,645		(467)	(5.7%)	
79					
80	2,382		1,486	38.6%	
81	792		(25)	(3.3%)	
82	0				
83	25		(9)	(58.4%)	
84	3,200		1,481	31.4%	
85					
86	484				
87	2,500				
88					
89	23,093		824	3.4%	
90	26,594		(2,613)	(10.4%)	
91					
92	(974)		(7,922)	(114.0%)	
93	(31,486)		(13,093)	(71.1%)	
94	2,332		(1,232)	(34.8%)	
95	2,879		(886)	(24.8%)	
96	(0)				
97	(298)		(347)	NM	
98	213		(1,785)	(89.4%)	
99	1,098		(9,502)	(90.0%)	
100	(28,685)		(15,774)	(122.9%)	
101					
102	324		2,908	90.0%	
103	(11,498)		7,305	174.1%	
104					
105	735				
106	(17,106)		(8,470)	(98.1%)	
107					
108					
109					
110	(\$0.17)		(\$7.92)	-102.2%	
111					
112	(0.7%)			-2011.6%	
113					
114	4.4%			-2624.6%	
115					

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	A	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	Y	Z	AA	AB	AC
116	Comp Ratio	47.0%		50.4%		50.4%		24.0%		60.3%		46.1%		56.6%		46.8%		61.1%		106.0%	
117																					
118	Non Comp Ratio	22.2%		19.2%		20.3%		23.4%		32.5%		23.2%		27.5%		27.6%		31.9%		61.8%	
119																					
120	Book Value / Share	\$41.35		\$42.25		\$43.55		\$39.60		\$29.34		\$29.34		\$25.93		\$21.43		\$18.59		\$14.97	
121																					
122	Tax Rate	26.9%		30.6%		30.6%		30.6%		30.6%		30.6%		30.6%		30.6%		30.6%		30.6%	
123																					
124																					
125	All In Results:																				
126	EPS	\$7.25		\$2.12		\$2.10		(\$2.99)		(\$12.57)		(\$10.73)		(\$2.20)		(\$4.95)		(\$5.56)		(\$3.46)	
127																					
128	ROE	20.3%		21.8%		21.0%		(27.0%)		(131.5%)		(25.2%)		(31.6%)		(82.3%)		(107.5%)		(78.6%)	
129																					
130	Pre-Tax Margin	30.6%		30.2%		29.9%		(958.4%)		NM		(114.0%)		(112.5%)		NM		53197.6%		NM	
131																					
132	Comp Ratio	47.0%		50.5%		50.0%		521.1%		NM		141.4%		143.0%		NM		22456.3%		NM	
133																					
134	Non Comp Ratio	22.2%		19.2%		20.1%		537.2%		NM		72.7%		69.5%		NM		14488.8%		NM	
135																					
136	Book Value / Share	\$41.35		\$42.25		\$43.55		\$39.60		\$29.34		\$29.34		\$25.93		\$21.43		(\$8.00)		\$18.59	
137																					
138	Tax Rate	26.9%		30.0%		28.9%		34.6%		31.0%		32.7%		40.4%		42.9%		38.0%		39.8%	
139																					
140																					
141	Revenue Ex Marks Ex One-Time	31,812		9,637		9,390		8,256		7,195		34,478		7,411		7,464		5,898		3,580	
142	Total PTE	9,801		2,935		2,757		4,348		520		10,561		1,176		1,915		395		(2,426)	
143	Total Taxes	2,633		898		844		1,330		159		3,232		380		586		121		(742)	
144	Total ATE	7,169		2,037		1,914		3,017		361		7,329		816		1,328		274		(1,684)	
145																					
146	Preferred Dividends	188		54		72		73		73		272		65		86		107		107	
147	Mandatory	-		-		-		-		-		-		110		149		149		149	
148	Net to Common	6,981		1,963		1,842		2,944		289		7,057		751		1,240		167		(1,940)	
149	Net to Common ROE	6,981		1,963		1,842		2,944		289		7,057		751		1,240		167		(1,940)	
150	Share Count	963.0		930.2		923.3		895.3		895.3		910.8		1,106.5		1,143.6		1,143.8		984.1	
151	Average Common Equity	34,348		36,335		36,951		37,712		34,206		36,301		27,870		25,182		29,585		29,034	
152																					
153																					
154	Preferred Dividends	188		54		72		73		73		272		65		86		107		107	
155	Mandatory	0		0		0		0		0		0		110		149		2,212		38	
156	Net to Common EPS	6,981		1,976		1,936		(2,453)		(10,370)		(8,908)		(2,143)		(4,871)		(7,438)		(5,529)	
157	Net to Common ROE	6,981		1,976	0	1,936		(2,453)	0	(10,370)	0	(8,908)		(2,143)	0	(4,871)	0	(7,438)		(5,529)	0
158	Share Count	963.0		930.2		923.3		821.6		825.0		830.2		974.1		984.1		1,338.9		1,596.7	
159	Average Common Equity	34,348		36,333		36,975		36,363		31,541		35,265		27,146		23,864		27,683		28,137	
160	Ending Equity	35,602		37,049		37,567		33,870		27,549		27,549		25,549		21,113		29,750		23,947	
161	Ending Period shares Outstanding	966.0		876.9		862.6		855.4		909.1		909.1		985.1		985.4		1,600.1		1,600.1	
162	Tax Rate	28.9%		30.0%		28.9%		34.6%		31.0%		32.7%		40.4%		42.9%		38.0%		39.8%	



	AD	AE	AF	AG	AH
116	62.0%			-1582.6%	
117					
118	33.7%			-1041.0%	
119					
120	\$14.97		(\$14.37)	-49.0%	
121					
122	30.6%			0.0%	
123					
124					
125					
126	(\$16.36)		(\$5.65)	(52.6%)	
127					
128	(73.1%)			(47.9) pts	
129					
130	NM			NM	
131					
132	NM			NM	
133					
134	NM			NM	
135					
136	\$14.97		(\$14.37)	(49.0%)	
137					
138	40.2%			(7.5) pts	
139					
140					
141	24,152				
142	1,059				
143	324				
144	735				
145					
146	367				
147	556				
148	(168)				
149	(168)				
150	1,095				
151	27,920				
152					
153					
154	367				
155	2,506				
156	(19,982)				
157	(19,982)				
158	1,220.1				
159	27,316				
160	23,947				
161	1,600.1				
162	40.2%				

## **Exhibit 29**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

-----  
In Re BANK OF AMERICA CORPORATION  
STOCKHOLDER DERIVATIVE LITIGATION  
-----

C.A. No.  
4307-VCS

January 19, 2012  
9:09 a.m.

Videotaped deposition of NEIL COTTY, taken by  
Plaintiffs, pursuant to Subpoena, held at the  
offices of Horwitz Horwitz & Paradis LLP,  
570 Seventh Avenue, New York, New York, before  
Joseph R. Danyo, a Shorthand Reporter and Notary  
Public within and for the State of New York.

HUDSON REPORTING & VIDEO, INC.  
124 West 30th Street, 2nd Fl.  
New York, New York 10001  
Tel: 212-273-9911 Fax: 212-273-9915

New York  
Connecticut

Hudson Reporting & Video  
Nationwide 1-800-310-1769

New Jersey  
Pennsylvania

1 Cotty  
2 conclusions looking at it today.

3 Q. Do you know if Mr. Price discussed  
4 the schedule that is in Cotty 32 with Mr. Lewis?

5 A. I'm not privy to that. I don't know.

6 Q. Did you discuss the schedule in Cotty  
7 32 with Mr. Lewis?

8 A. I don't recall discussing it with Mr.  
9 Lewis.

10 Q. Aside from the December 3rd meeting  
11 with Mr. Thain, Mr. Lewis and Mr. Price, did you  
12 have any interactions with Mr. Lewis during the  
13 fourth quarter of 2008?

14 A. Not that I recall, no.

15 MR. SCHWARTZ: I ask the reporter to  
16 mark as Exhibit 33 a document Bates  
17 stamped BAC ML NYAG 10026898 through 901,  
18 and the last three pages are a printout of  
19 the native file.

20 (Cotty Exhibit 33, Document bearing  
21 Bates numbers BAC ML NYAG 10026898 through  
22 901, was so marked for identification, as  
23 of this date.)

24 Q. If you could take a moment and review  
25 Exhibit 33 and tell me if you can identify it.

## **Exhibit 30**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

Neil Andrew Cotty

December 16, 2009

CONFIDENTIAL

Page 1

Confidential - Cotty

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----X  
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs. 09-CV-6829

BANK OF AMERICA,

Defendant.

-----X

CONFIDENTIAL

NEIL ANDREW COTTY

New York, New York

Wednesday, December 16, 2009

Reported by: Steven Neil Cohen, RPR

Job No. 305877

Neil Andrew Cotty

December 16, 2009

CONFIDENTIAL

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1 Confidential - Cotty

2 you saw for adjustments coming out of the  
3 Ken Lewis, John Thain meeting.

4 Q. That is the adjustment that you  
5 had proposed?

6 A. We proposed a one point -- 1 to  
7 3 billion range.

8 Before we went on to the 2009  
9 plan, Ken says, wait a minute, we need to  
10 put a place holder in. I don't know if he  
11 said place holder but Neil threw out a 1 to  
12 3 billion range, we need to decide what to  
13 put in, and Ken says it sounds like it is  
14 3 billion and so we put in a  
15 \$3 billion place holder for the quarter.

16 Q. Did anyone disagree with that  
17 place holder?

18 A. No. Not at all.

19 Q. Did anyone think it was too small?

20 A. Nobody said too small at all.

21 Q. Did you view it as a conservative  
22 place holder?

23 A. I viewed it as a good number, a  
24 conservative place holder. I thought 3  
25 billion is a big number.

## **Exhibit 31**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

**Merrill Lynch & Co**

**2008 4Q Pacing & FY Forecast Scenario**

**12/3/2008 (Revised 6PM)**

*Pre-TM H  
still about  
Ultras  
w/Ad*

---

Merrill Lynch & Co.  
4Q08 Forecast Assumptions

---

**A. November estimate excludes:**

- ✓ CVA marks
- ✓ Correlation marks

**B. November estimate includes:**

- ✓ \$1.8 bln on DTA
- ✓ (\$714) mln on OTTI
- ✓ (\$2.0) bln TBD marks

**C. December Forecast assumes:**

- ✓ Based on 20 days, revenue pacing \$73 per day
- ✓ (\$1.0) bln TBD marks
- ✓ Assumes incentives of \$3.5 bln for FY08
- ✓ Assumes \$300 mln December non-comp spike based on historical trends
- ✓ No goodwill write-off



Merrill Lynch & Co.  
4Q'08 Forecast

					4Q08 Pacing					
					Oct Act (26 days)	Nov Est (20 days)	QTD Est (45 days)	Dec BTG (20 days)	4Q08F	FY08 First
Revenue ex Marks/FVA/One-Time										
FICC	4Q07	3Q08	Sep08 YTD		(1,389)	(804)	(2,193)	17	(2,176)	2,591
Equity	854	628	4,766		1,037	10	1,048	467	1,515	8,138
IBK	1,653	1,368	4,623		102	26	127	305	432	2,712
GPID	1,080	571	2,280		(296)	(387)	(683)	(17)	(700)	(1,073)
GMI Other	298	(316)	(373)		87	3	70	(110)	(40)	(414)
GMI	(180)	136	(374)		(479)	(1,153)	(1,631)	663	(966)	9,953
GPC	3,704	2,389	10,922		1,094	892	1,986	914	2,900	12,348
GIM	3,414	2,933	9,448		(18)	(26)	(44)	(16)	(60)	285
GWM	151	88	325		1,076	866	1,942	898	2,840	12,613
GWM	3,564	3,021	9,773							
Corporate	(72)	287	(122)		532	1,781	2,313	(105)	2,208	2,086
ML&Co ex Marks/FVA/One-Time	7,196	5,897	20,572		1,130	1,494	2,624	1,456	4,080	24,652
Significant Items (Non-Marks)	-	2,133	2,133		(2,619)	(720)	(3,338)	(1,000)	(3,336)	(1,205)
Total Marks	(16,718)	(10,656)	(26,807)		(2,720)	(3,789)	(6,509)	(1,000)	(7,509)	(34,417)
FVAs	1,331	2,842	5,036		(1,078)	225	(851)	-	(853)	4,193
Total Marks/Significant Items	(15,387)	(5,681)	(19,739)		(6,417)	(4,284)	(10,701)	(1,000)	(11,701)	(31,430)
Total Revenue	(8,192)	16	834		(6,287)	(2,790)	(8,077)	456	(7,621)	(6,787)
Comp	3,021	2,725	8,942		1,051	893	1,934	888	2,823	11,765
Non Comp	2,335	1,819	5,917		612	655	1,267	944	2,212	8,129
WCP	1,318	758	2,228		495	550	1,045	252	1,297	3,525
Total Expenses ex One-Time	6,875	5,302	17,087		2,158	2,089	4,247	2,085	6,331	23,419
FF/ARS	54	425	425		92	92	92	-	92	517
Restructuring	-	40	484		(1)	(1)	(1)	-	(1)	484
Temasek	-	2,500	2,500		-	-	-	-	-	2,500
PTE	(14,920)	(8,251)	(19,653)		(7,536)	(4,878)	(12,415)	(1,629)	(14,043)	(33,706)
Taxes	(4,623)	(3,132)	(7,940)		(3,000)	(1,756)	(4,756)	(299)	(5,056)	(12,996)
ML Operating ATE	(10,287)	(5,119)	(11,723)		(4,536)	(3,122)	(7,659)	(1,329)	(8,988)	(20,710)
All In Results:										
EPS	\$ (12.57)	\$ (5.55)	\$ (13.16)		\$ (2.86)				\$ (5.71)	\$ (19.33)
ROE	(131.5%)	(107.5%)	(220.1%)						(147.6%)	(81.1%)
Pre-Tax Margin	NM	NM	NM						NM	NM
Comp Ratio	NM	NM	NM						NM	NM
Non Comp Ratio	NM	NM	NM						NM	NM
Tax Rate <sup>1</sup>	31.0%	38.0%	40.4%		39.8%	36.0%	38.3%		36.0%	38.8%
Ex Marks/FVA/One-Time Results										
Revenue	7,196	5,897	20,572	1,130	(1,028)			1,456	4,080	24,652
PTE	521	395	3,485	(1,028)	(714)			(629)	(2,251)	1,234
ATE	362	274	2,419	(714)	(436)			(1,562)	(1,562)	856
EPS	\$ 0.28	\$ 0.15	\$ 1.91	\$ (0.78)					\$ (1.85)	\$ (0.07)

<sup>1</sup> 4Q08F tax rate based on prior PTE estimates.

Merrill Lynch & Co.  
Marks Detail & One-Time Items Summary

	FY2007	1Q08	2Q08	3Q08	Sept08 YTD	Oct'08	Nov'08 Est	Dec'08 F	4Q08F	FY08
U.S. Super Senior	(14,592)	(1,782)	(3,459)	(4,719)	(9,960)	(72)	(200)	-	(272)	(10,232)
Secondary Trading	(2,227)	310	(33)	(117)	160	-	-	-	-	160
Total U.S. ABS CDO	(16,819)	(1,472)	(3,492)	(4,836)	(9,800)	(72)	(200)	-	(272)	(10,072)
US Subprime	(3,236)	(307)	(544)	(391)	(1,242)	(119)	-	-	(119)	(1,361)
Alt A	(399)	(402)	(548)	(492)	(1,443)	(13)	-	-	(13)	(1,456)
US Prime <sup>(1)</sup>	14	31	67	(123)	(25)	32	-	-	32	7
Non US	(507)	(105)	(226)	(1,282)	(1,516)	(190)	(172)	-	(362)	(1,978)
Residential Mortgage	(4,129)	(782)	(1,255)	(2,289)	(4,326)	(290)	(172)	-	(462)	(4,788)
Investment Portfolio	(969)	(421)	(1,673)	(852)	(2,945)	(16)	(714)	-	(730)	(3,676)
Commercial Real Estate <sup>(2)</sup>	456	53	(15)	(832)	(794)	(430)	-	-	(430)	(1,224)
CVA on monolines/other insurers	(3,148)	(3,031)	(2,888)	(1,302)	(7,221)	(1,352)	-	-	(1,352)	(8,573)
Lev Fin - FICC	(206)	(324)	(123)	(191)	(636)	(196)	(245)	-	(442)	(1,080)
Lev Fin - IBK	(382)	(603)	(226)	(354)	(1,183)	(363)	(457)	-	(820)	(2,003)
Other / TBD	-	-	-	-	-	-	(2,000)	(1,000)	(3,000)	(3,000)
Total Marks	(23,187)	(6,580)	(9,671)	(10,656)	(26,907)	(2,719)	(3,789)	(1,000)	(7,509)	(34,416)
Fair Value Adjustments	1,958	2,103	91	2,842	5,036	(1,078)	225	-	(853)	4,183
Freddie / Fannie	-	-	-	(606)	(506)	-	-	-	-	(506)
Other Market Dislocations	-	-	-	(1,568)	(1,568)	(733)	-	-	(733)	(2,301)
GPID One-Time	-	-	-	(90)	(90)	(30)	-	-	(30)	(120)
Bloomberg Gain on Sale	-	-	-	4,296	4,296	-	-	-	-	4,296
Other Loan Portfolio	-	-	-	-	-	(278)	(266)	-	(544)	(544)
CP / PCG	-	-	-	-	-	(434)	-	-	(434)	(434)
Credit Prop - Auto Industry	-	-	-	-	-	-	(525)	-	(525)	(525)
CVA Related (Equity & FICC CVAs)	-	-	-	-	-	(628)	(24)	-	(652)	(652)
Sigma-collateralized CLNs	-	-	-	-	-	(245)	-	-	(245)	(245)
EMEA Synthetic RMBS/CMBs & Correlation	-	-	-	-	-	(400)	-	-	(400)	(400)
Susquehanna CDS Hedge from LEH Bankruptcy	-	-	-	-	-	-	(80)	-	(80)	(80)
FAS133	-	-	-	-	-	129	175	-	304	304
One-Time Items Non-Marks	-	-	-	2,132	2,132	(2,619)	(720)	-	(3,339)	(1,207)
Total Marks/FVA/One-Time	(23,228)	(4,477)	(9,580)	(5,881)	(19,739)	(6,417)	(4,284)	(1,000)	(11,704)	(31,438)

1. US Prime / Resi includes GWM gains: 1Q +34, 2Q +110, 3Q +99, Oct08 +36  
 2. CRE includes GWM gains: 1Q +15, 2Q +22, 3Q +22, Oct08 +9

## October 2008 Marks / Significant Items

	FICC	Equity	IBR	GPID	Corp/GNM	Total	Commentary / Drivers
<b>I - Corp Loans / PCCs &amp; CPI</b>							
Low Fin marks	(196)	-	(363)	-	-	(559)	✓ Losses in Loan Portfolio largely due to Transitory positions (\$506mm), which include both legacy hung positions and new deal activity, along with losses of (\$224mm) on Core Hold Portfolio. Relationship loans had markdowns of (\$663mm), partially offset by gains on CDS hedges of \$513mm.
Other Loan Portfolio	(729)	(22)	(181)	-	-	(278)	✓ CRRP/CPI results impacted by (\$434mm) MTM as inventory primarily consisting of subordinated positions in the capital structure of smaller, highly leveraged companies (second lien, unsecured debt, convertibles) plunged in value in October as worries of a severe global recession intensified.
Corporate Loan Portfolio (incl. Low Fin)	(271)	(22)	(544)	-	-	(837)	
PCC/CPI	(434)	-	-	-	-	(434)	
<b>Total</b>	(705)	(22)	(544)	-	-	(1,271)	
<b>II - Residential Mortgage:</b>							
Non US Resi	(190)	-	-	-	-	(190)	✓ Primarily due to write-downs of European Residential Whole Loan positions.
All A	(13)	-	-	-	-	(13)	✓ Model correction to appropriately cap the value of the CDS protection purchased from CDOs where the super senior obligation to perform was pushed out to legal maturity or eliminated altogether.
US Subprime (incl RPI)	(119)	-	-	-	-	(119)	
US Prime (incl C/Boat & AHA for GPI and GNM)	42	-	-	(46)	38	32	
<b>Total</b>	(280)	-	-	(46)	38	(290)	
<b>III - Commercial Real Estate:</b>							
EMEA REF	(158)	-	-	-	-	(158)	✓ LCCOM remains on EMEA Commercial Whole Loan portfolio due to lower bid level from Lone Star.
US CMBS Secondary	(94)	-	-	-	-	(94)	✓ CMBS Secondary trading desk mark-downs due to spreads widening.
US Conduit Loans	(144)	-	-	-	-	(144)	✓ Remark on Merit's and Hilton Commercial Whole Loan positions.
Real Estate Investments	(46)	-	-	-	-	(46)	
GNM CRE	9	-	-	(46)	9	(36)	
<b>Total</b>	(349)	-	-	(46)	9	(430)	
<b>IV - Investment Portfolio:</b>							
Securities Investment Portfolio	(16)	-	-	-	-	(16)	✓ Primarily due to remark of long synthetic CDS, CLCs and ABS positions.
<b>V - Correlation Book:</b>							
EMEA Synthetic RMBS/CMBS	(400)	-	-	-	-	(400)	✓ Mt. CDS spreads narrowed approximately 200 basis pts while counterparty spreads widened during October.
Vf - CVA related	-	(300)	-	-	-	(300)	✓ CVA losses due to an increase in hedge mark-to-market exposures primarily on MBS, CDOs, XLCA, and Radcon.
Equity	(1,099)	-	-	-	-	(1,099)	✓ Primarily due to losses on Merrill Lynch spread tightening on derivative liabilities and counterparty spreads widening on derivative assets.
Credit	(733)	-	-	-	-	(733)	
Rules & Currencies	(2,414)	(300)	-	-	-	(2,714)	
<b>Total</b>	(729)	-	-	-	-	(729)	
<b>VII - U.S. ABS CDO:</b>							
U.S. Super Senior	(245)	-	-	-	-	(245)	✓ CFSI America's results negatively impacted by (\$30mm) due to impairment losses on two asset based trading facilities as current borrower's financial conditions weakened (potential bankruptcy filing in one instance) and the underlying collateral securing our facilities will not be sufficient to recover our current principal outstanding.
Other	(245)	-	-	-	-	(245)	✓ Mainly driven by FAS 133 ineffectiveness P&L gain of \$253mm, which includes impact that had to be re-evaluated post terminating swaps with Lehman, offset by (\$100mm) due to MTM on FX cross currency basis swaps due to significant movements in the European currencies.
Sigma CLNs	(4,528)	(322)	(544)	(82)	46	(5,438)	✓ Primarily attributed to SN's where credit spreads tightened by ~ 50bps in the middle and far end of the curves.
<b>Total before FVA</b>	(4,528)	(322)	(544)	(82)	46	(5,438)	
<b>GPID (Structured Finance)</b>				(30)		(30)	
FAS 133	-	-	-	-	129	129	
FVA	-	-	-	-	(1,076)	(1,076)	
<b>Grand Total</b>	(4,506)	(322)	(544)	(122)	(803)	(6,417)	

November 2008 Marks / Significant Items

	FICC	Equity	IBK	SPID	Corp/GNM	Total	Commentary / Drivers
<b>I - Corp Loans / PCG &amp; CPI</b>							
Low Fin marks	(246)	-	(467)	-	-	(703)	✓ Losses in Loan Portfolio largely due to "transitory positions" (\$600mm), which include both legacy hung positions and new deal activity, along with losses of (\$265mm) on Core Hold Portfolio. Relationship loans had markdowns of (\$250mm), partially offset by gains on CDS hedges of \$200mm
Other Loan Portfolio	(98)	(5)	(172)	-	-	(266)	
Corporate Loan Portfolio (incl. Low Fin)	(334)	(5)	(629)	-	-	(969)	
PCG/CPI	(334)	(5)	(629)	-	-	(969)	
<b>II - Residential Mortgage:</b>							
Non US Resl	(8)	-	-	-	-	(8)	✓ Primarily due to write downs of European Residential Whole Loan positions (Mortgages PLC / Wavro)
All A	-	-	-	-	-	-	
US Subprime (incl RPI)	-	-	-	-	-	-	
US Prime (incl C/Class & ARM for GPI and Total	(9)	-	-	-	-	(8)	
<b>III - Commercial Real Estate:</b>							
EMEA REF	(184)	-	-	-	-	(164)	✓ European Real Estate Lending
US CMBS Secondary	-	-	-	-	-	-	
US Conduit Loans	-	-	-	-	-	-	
Real Estate Investments	-	-	-	-	-	-	
GNM CRE	-	-	-	-	-	-	
<b>Total</b>	(164)	-	-	-	-	(164)	
<b>II - Investment Portfolio:</b>							
Securities Investment Portfolio	(714)	-	-	-	-	(714)	✓ OTTI
<b>V - Correlation Book:</b>							
EMEA Synthetic RMBS/CMBS	-	-	-	-	-	-	
<b>III - CVA related</b>							
Equity	(95)	-	-	-	-	(85)	✓ Counterparty spreads widened
Credit	-	-	-	-	-	-	
<b>Rates &amp; Currencies / FICC Mgmt (CPIV)</b>							
Total	41	-	-	-	-	41	✓ Widening of MEF spread +83 m. CP spreads widening less hedges (-52) m/n
<b>VII - U.S. ABS CDO:</b>							
U.S. Super senior	(200)	-	-	-	-	(200)	✓ Driven by the inversion of the HYC/LAHYOLA curve, causing large losses since the index is heavy with auto mortgages.
<b>IV - Other:</b>							
Credit Prop - Auto Industry (JVC/RBU)	(525)	-	-	-	-	(525)	✓ Susquehanna CDS hedge from LEH bankruptcy (net of recovery)
GMF & S CDS hedge	-	(80)	-	-	-	(80)	✓ Marks TBD
Other TBD	(2,000)	(80)	-	-	-	(2,000)	
Total	(2,525)	(80)	-	-	-	(2,605)	
<b>Total before FVA</b>	(3,904)	(150)	(629)	-	-	(4,684)	
<b>FAS 133</b>							
PVA	-	-	-	-	225	175	✓ Due to a large 30yr deal which was not hedged (because of the Lehman bankruptcy) until mid month and therefore failed effectiveness testing. Coupling that were normal deals that failed effectiveness testing because of interest rate volatility.
<b>Grand Total</b>	(3,904)	(150)	(629)	-	400	(4,284)	✓ Primarily attributed to the pre paid gas contracts out of Houston which discount the notes off of libor and the credit curve. Although the credit curve was flat, USD LIBOR rates were extremely volatile throughout the month.

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## **Exhibit 32**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF AMERICA CORP.  
SECURITIES, DERIVATIVE AND  
EMPLOYEE RETIREMENT INCOME  
SECURITY ACT (ERISA) LITIGATION

09 MD 2058 (PKC)

THIS DOCUMENT RELATES TO:

The Consolidated Securities Action

**PLAINTIFFS' RESPONSES AND OBJECTIONS TO  
KENNETH D. LEWIS'S FIRST SET OF INTERROGATORIES TO PLAINTIFFS**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and Rule 33.3 of the Local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York ("Local Rules"), Court-appointed Class Representatives the State Teachers Retirement System of Ohio, the Ohio Public Employees Retirement System, the Teacher Retirement System of Texas, Stichting Pensioenfonds Zorg en Welzijn, represented by PGGM Vermogensbeheer B.V., Fjärde AP-Fonden, and Grant Mitchell (collectively, "Plaintiffs") hereby respond and object to Defendant Kenneth D. Lewis's First Set of Interrogatories To Plaintiffs (the "Interrogatories") as follows:

**INTRODUCTION**

Plaintiffs' responses to these Interrogatories are made for the sole purpose of this action. Each answer is subject to all objections as to competence, relevance, materiality, admissibility, privilege, privacy and the like, and any and all other objections are reserved and may be interposed at the time of trial.

with Price, Thain, and Cotty a loss report that reflected that Merrill would pay bonuses of \$3.525 billion for 2008, notwithstanding an estimated after-tax loss for the year of over \$20.5 billion. *See* PX 491. The loss report reviewed by Lewis also reflected that Merrill would accrue \$1.297 billion in bonus expense for the fourth quarter of 2008 (approximately 175% greater than the prior three quarters), notwithstanding an estimated \$9 billion after-tax loss for the fourth quarter. *Id.*; *see also* PX 11.

Lewis and BoA remained informed of the accelerated timing of Merrill's bonus payments throughout the fourth quarter. For example, Alphin notified Lewis about the accelerated timing of Merrill's bonus payments "within two or three days" after Alphin learned about the acceleration in November. *See* Alphin Tr. (NYAG - 2/8/12) at 77:20-78:12. On December 9, 2008, Lewis attended a meeting of the BoA's Compensation Committee, during which the Committee "reviewed the year-end compensation timeline" for Merrill. *See* BAC-ML-DE-UR-00156051-2; *see also* BAC-ML-NYAG70345873.

Thain and other witnesses have confirmed that Lewis and BoA approved Merrill's 2008 bonuses, and that any claim to the contrary is untrue. For example, Thain has publicly stated: "[T]hey agreed in September that we could pay up to \$5.8 billion of bonuses. They were totally involved in the process to do that.... And basically when I got fired in January – when they said John Thain secretly accelerated these bonuses – they were lying." *See* PX 534; *see also* Finnegan Tr. at 225:15-227:20.

### **Interrogatory No. 2**

With respect to Paragraph 95 of the Second Amended Complaint, identify any fact supporting the allegation that Mr. Lewis "knew of Merrill's losses as they occurred."

**Response to Interrogatory No. 2:**

Plaintiffs object to this Interrogatory as vague, ambiguous, overbroad and unduly burdensome because it purports to require Plaintiffs to identify “*any* fact supporting the allegation that Mr. Lewis ‘knew of Merrill’s losses as they occurred.’” Plaintiffs further object to this Interrogatory because it is duplicative of other interrogatories and discovery requests. Plaintiffs further object to this Interrogatory because it quotes only a portion of Plaintiffs’ allegations set forth in Paragraph 95 of the Second Amended Complaint. Plaintiffs refer Defendants to the Second Amended Complaint for its complete and accurate contents.

As noted above in Plaintiffs’ response to Interrogatory No. 1, Lewis was the President, Chief Executive Officer, and Chairman of BoA’s Board during all relevant times (*see* Lewis Tr. at 12:19-16:2), and, as set forth in BoA’s bylaws, Lewis was responsible for “supervis[ing] and control[ing] the business and affairs of the Corporation.”

BoA and Lewis were kept informed of Merrill’s fourth quarter losses as they occurred. As Defendant Thain explained, “Ken Lewis and the Bank of America team” were “seeing exactly the same information that [Merrill and Thain] saw. [Merrill] gave them complete access to everything that [Merrill] had.” *See* PX 179. They “had daily access to [Merrill’s] p&l [profit and loss statements], [Merrill’s] positions and [its] marks,” and BoA “knew about the losses at the same time [Merrill] did.” *See* PX 351; *see also* April 17, 2009 PBS Frontline interview of Thain. Lewis admitted to Congress that BoA received “detailed financial reports every week” from Merrill, that “we did know that there were losses,” and that Merrill’s losses were “clear” before the shareholder vote. *See* BAC-ML-CL00028174, at 216.

Lewis spoke, “quite often daily,” with Price, who was one of his direct reports and who “generally kept [Lewis] apprised.” *See* Price Tr. at 237:17-25; Price Tr. (NYAG) at 22:9-13. Price, who was regularly receiving information about Merrill’s loss expectations, kept Lewis “up



to speed on everything” related to Merrill’s losses. *See* Price Tr. (NYAG) at 103:23-104:3, 346:3-17; *see also, e.g.*, PX 210, 235, 485, 594. Lewis was “constantly walking into [Price’s] office or [Price] was constantly walking into [Lewis’ office].” *See* Lewis Tr. at 58:22-24. As a result, Lewis was “hearing about [Merrill’s fourth quarter loss estimates] and in some cases [he] saw them.” *See* Lewis Tr. (NYAG) at 10:13-18.

Lewis and Price also received information about Merrill’s losses from Neil Cotty, BoA’s Chief Accounting Officer. Cotty was appointed to be Merrill’s acting Chief Financial Officer and was “in residence at Merrill” after the Merger was announced specifically in order to update Lewis and BoA on any changes in Merrill’s financial condition. *See* Chai Tr. at 107:19-108:24; Cotty Tr. (SEC) at 63:18-63:25; Lewis Tr. at 119:13-20. As Lewis testified, Cotty was “actively engaged in looking at [Merrill’s] numbers,” including Merrill’s “daily statements” and marks on its assets. *See* Lewis Tr. at 120:5-16. In this capacity, Cotty regularly reported to, and communicated with, Lewis and Price about Merrill’s losses during the fourth quarter of 2008. For example, on November 5, 2008, Cotty sent an email concerning Merrill’s October results to Price with the notation: “Read and weep.” *See* PX 235; *see also, e.g.*, PX 210, 485, 594. Cotty explained that he used these words to ensure that Price would “focus” on the attachment and the loss data in particular. *See* Cotty Tr. at 148:14-149:14. In addition, as set forth further below, on December 3, 2008, Cotty met with Lewis, Price and Thain to discuss Merrill’s fourth quarter losses. *See* Lewis Tr. at 111:2-112:11.

At his deposition, Lewis specifically recalled that he learned in November 2008 of “significant” fourth quarter losses at Merrill of approximately \$5 billion after taxes. *See* Lewis Tr. at 57:17-59:12, 67:15-21, 109:13-16. Lewis further recalled that, on December 3, during his meeting with Price, Thain, and Cotty, he was told that Merrill’s losses for the fourth quarter had

grown to approximately \$7 billion after taxes. *Id.* at 108:25-109:21, 111:2-113:18. During this meeting, Lewis was presented with a written loss report that detailed Merrill's approximate \$7 billion after-tax loss for the fourth quarter, including Merrill's more than \$7.5 billion actual pre-tax loss for the month of October. *Id.* at 114:16-24; PX 566. After reviewing and discussing Merrill's loss information with Cotty, Price and Thain, Lewis determined that Merrill's estimated loss for the quarter had to be increased to \$9 billion after-taxes. *See* Cotty Tr. at 331:19-332:15; Lewis Tr. at 117:13-121:12; PX 11. As Lewis testified, this \$9 billion loss was included that evening on Merrill's loss report at Lewis's direction. *See* Lewis Tr. at 115:17-117:2, 121:4-12; *see also* PX 11. As explained further below, after the December 5 shareholder vote, Lewis continued to receive additional information on Merrill's fourth quarter losses as they were occurring. Lewis received updated loss estimates on December 12, 17 and 19, among other times, and discussed them with Defendant Price and other senior executives, BoA's outside counsel, and federal regulators, including the Chairman of the Federal Reserve and the Secretary of the Treasury. *See* Lewis Tr. at 220:11-222:2; *see also, e.g.*, Moynihan Tr. (NYAG) at 191:10-192:7; BAC-ML-NYAG70276757; PX 438; PX 443; PX 569.

Lewis also knew of Merrill's losses through his role as the Chairman of BoA's Board of Directors and his attendance at Board meetings. At a Board meeting that occurred right after the shareholder vote on December 5, Price told the Board that Merrill was expected to report \$9 billion of losses in the fourth quarter of 2008. *See* Price Tr. at 352:5-22. At the December 9, 2008 Board meeting, Price again told the Board that Merrill was "forecast[ed] to have a net loss of \$9 billion" in the fourth quarter of 2008 and that, "due to the relative size of the Merrill Lynch exposures, the magnitude of the losses is quite significant and has been further impacted by the fact that banking flows which would act as a buffer have all but evaporated." *See* PX 340; *see*

*also* Lewis Tr. 164:14-168:22. In addition, Price told the Board at that meeting that, as a result of Merrill's losses, BoA was forced to issue \$9 billion of long-term debt prior to the shareholder vote. *See* PX 340.

Lewis also knew of Merrill's losses through his discussions concerning whether the losses should be disclosed to BoA's shareholders. On at least two occasions prior to the December 5 shareholder vote, Lewis specifically discussed with Price whether Merrill's losses, due to their enormity, should be disclosed. *See* Lewis Tr. at 72:10-81:23, 149:10-153:25; Lewis Tr. (SEC) at 263:20-264:8.

Lewis also knew of Merrill's losses through his decision, prior to the shareholder vote, to dramatically reduce Merrill's balance sheet. As reflected in a memorandum prepared by BoA's lawyers after speaking with Lewis and others, "[t]he need to reduce assets ha[d] become necessary and was identified just before Thanksgiving as a necessary step to deal with increasing losses that were not anticipated at [the] time of signing [the Merger Agreement]." *See* PX 277; *see also* Lewis Tr. at 133:7-24. Indeed, on December 3, Lewis met with Thain to "underscore the importance of tangible capital ratio," which had deteriorated by a "large amount" prior to the vote as a result of Merrill's losses. *See* PX 543; *see also* Lewis Tr. at 125:13-16, 126:17-128:2, 148:3-12. During that meeting, Lewis instructed Thain that, as result of Merrill's losses, Thain needed to "push [in reducing the balance sheet] as hard as you can and only think about stopping when you think you've pushed too far and then... push some more." *See* PX 543; *see also* Lewis Tr. at 131:19-132:5. Lewis also told his lawyers at Wachtell, Lipton, Rosen & Katz ("Wachtell") that, as a result of its fourth quarter losses, Merrill was required to significantly reduce its balance sheet. *See* Roth Tr. at 264:17-265:23.

Lewis also knew of Merrill's losses through his communications concerning whether to terminate the Merger based on a "materially adverse change" in Merrill's financial condition. Lewis participated in multiple communications and meetings with BoA executives, Wachtell attorneys, and the federal government concerning Merrill's losses and their "materially adverse" impact on Merrill and the combined company. *See* Lewis Tr. at 219:8-266:22; Alphin Tr. at 176:20-177:24. For example, during a December 15 meeting, Lewis and Price told their attorneys at Wachtell that "[w]e know that Merrill [has losses] disproportionately worse ... than [Goldman Sachs and Morgan Stanley] this quarter." *See* Roth Tr. at 222:14-223:25. During a December 17 meeting, Lewis, Moynihan and Price again told their attorneys at Wachtell that the "Q4 loss of 12.5 BN @ ML" was "disproportionate in size [to Merrill's peers]," with Merrill "burn[ing] 50% common equity ... necessary to support [its] business." *See* PX 569. On that same day, Lewis also told the federal government that Merrill's losses were \$12.5 billion after taxes, with Merrill losing "about 50% [of its] tangible equity." *See* PX 438. During a December 19 meeting, Lewis told the federal government that Merrill's pre-tax losses were \$21.4 billion, including a \$2.3 billion goodwill charge. *See* PX 443.

Lewis also knew of Merrill's losses through his discussions with Thain and other Merrill executives. Lewis spoke with Thain on a weekly basis, which included discussions concerning Merrill's financial condition and its fourth quarter losses. *See* Thain Tr. at 166:13-18; Roth Tr. at 240:19-24, 264:17-21. For example, Lewis and Thain participated in discussions on both December 3 and 9 concerning Merrill's pre-vote estimated fourth quarter loss in excess of \$9 billion. *See* PX 74.

The federal regulators, who interacted with Lewis about Merrill's losses, also believed that Lewis knew of Merrill's losses as they occurred. In fact, they concluded that Lewis was not

being truthful when he feigned surprise of Merrill's losses. They concluded that there were "clear signs in the data we have that the deterioration at ML ha[d] been observably under way over the entire quarter, albeit picking up significant around mid-November" and that "Ken Lewis' claim that they were surprised by the rapid growth of the losses seems somewhat suspect." *See* PX 264; *see also* Alfrend Tr. at 62:11-63:4. The federal regulators further concluded that Lewis must have been aware of the losses by "as early as mid-November" and predicted that his failure to disclose the losses to investors "could cause other problems around the disclosures BA made for the shareholder vote." *See* PX 441. As Governor of the Federal Reserve Mr. Kevin Warsh reiterated at his deposition, he was "somewhat skeptical that [Merrill's losses] could have been such a surprise." *See* Warsh Tr. at 83:21-84:18.

### **Interrogatory No. 3**

With respect to Paragraph 126 of the Second Amended Complaint, identify any fact supporting the allegation that Mr. Lewis "knew that Merrill had decided in November to take a \$2.2 billion goodwill writeoff."

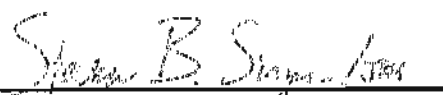
### **Response to Interrogatory No. 3:**

Plaintiffs object to this Interrogatory as vague, ambiguous, overbroad and unduly burdensome because it purports to require Plaintiffs to identify "*any* fact supporting the allegation Mr. Lewis 'knew that Merrill had decided in November to take a \$2.2 billion goodwill writeoff.'" Plaintiffs further object to this Interrogatory because it is duplicative of other interrogatories and discovery requests. Plaintiffs further object to this Interrogatory because it quotes only a portion of Plaintiffs' allegations set forth in Paragraph 126 of the Second Amended Complaint. Plaintiffs refer Defendants to the Second Amended Complaint for its complete and accurate contents.


As noted above in Plaintiffs' response to Interrogatory No. 1, Lewis was the President, Chief Executive Officer, and Chairman of BoA's Board during all relevant times (*see* Lewis Tr.



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*Co-Lead Counsel for Plaintiffs in the Securities Actions*

## **Exhibit 33**

**To Smolar Declaration in  
Support of Motion for Summary Judgment**

Filed Pursuant to Rule 424(b)(5)  
Registration No. 333-133852

### CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered	Amount to be Registered	Proposed Maximum Offering Price Per Unit	Proposed Maximum Aggregate Offering Price	Amount of Registration Fee(1)
Common Stock, \$0.01 par value	523,250,000	\$22.00	\$11,511,500,000	\$452,401.95

(1) Calculated in accordance with Rule 457(r) of the Securities Act of 1933.



### 455,000,000 Shares of Common Stock

We are offering 455,000,000 shares of our common stock, par value \$0.01 per share, for sale in this offering. We will receive all of the net proceeds from the sale of our common stock.

Our common stock is listed on the New York Stock Exchange under the symbol "BAC." On October 7, 2008, the last reported sale price of our common stock on the New York Stock Exchange was \$23.77 per share.

**Investing in our common stock involves risks. See "Risk Factors" beginning on page S-7 of this prospectus supplement.**

*Our common stock is not a savings account, deposit, or other obligation of a bank. Our common stock is not insured by the Federal Deposit Insurance Corporation or any other governmental agency.*

*Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or passed upon the adequacy of this prospectus supplement or the attached prospectus. Any representation to the contrary is a criminal offense.*

	Per Share	Total
Public offering price	\$ 22.00	\$ 10,010,000,000
Underwriting discounts and commissions	0.55	250,250,000
Proceeds (before expenses)	\$ 21.45	\$ 9,759,750,000

We have granted to the underwriters an option to purchase up to 68,250,000 additional shares of our common stock, on the same terms and conditions set forth above, if the underwriters sell more than 455,000,000 shares of our common stock in this offering. The underwriters can exercise this right at any time and from time to time, in whole or in part, within 30 days of the date of this prospectus supplement.

We will deliver the shares of common stock in book-entry only form through the facilities of The Depository Trust Company on or about October 10, 2008.

**Banc of America Securities LLC**

**Merrill Lynch & Co.**

**Prospectus Supplement to Prospectus dated May 5, 2006**

**October 7, 2008**



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Prospectus

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## ABOUT THIS PROSPECTUS SUPPLEMENT

In considering an investment in the common stock, you should rely only on the information included or incorporated by reference in this prospectus supplement and the attached prospectus. We have not authorized any other person to provide you with different information. If anyone provides you with different or inconsistent information, you should not rely on it. If information in this prospectus supplement is inconsistent with information in the attached prospectus, the information in this prospectus supplement supersedes the information in the attached prospectus. The delivery of this prospectus supplement, at any time, does not imply that there has been no change in our affairs since the date of this prospectus supplement or that the information in this prospectus supplement or the attached prospectus is correct as of any time after its date.

This prospectus supplement and the attached prospectus do not constitute an offer to sell or the solicitation of an offer to buy the common stock in any jurisdiction in which that offer or solicitation is unlawful. The distribution of this prospectus supplement and the attached prospectus and the offering of the common stock in some jurisdictions may be restricted by law. If you have received this prospectus supplement and the attached prospectus, you should find out about and observe these restrictions. See “Underwriting.”

This prospectus supplement has been prepared on the basis that any offer of the common stock in any Member State of the European Economic Area (each, a “Relevant Member State”) which has implemented the Prospectus Directive (2003/71/EC) (the “Prospectus Directive”) will be made pursuant to an exemption under the Prospectus Directive, as implemented in that Relevant Member State, from the requirement to publish a prospectus for offers of the common stock. Accordingly, any person making or intending to make an offer in that Relevant Member State of the common stock which is the subject of the offering contemplated in this prospectus supplement and the attached prospectus may only do so in circumstances in which no obligation arises for us or any of the underwriters to publish a prospectus pursuant to Article 3 of the Prospectus Directive in relation to such offer. Neither we nor the underwriters have authorized, and neither we nor they authorize, the making of any offer of the common stock in circumstances in which an obligation arises for us or the underwriters to publish a prospectus for such offer.

**Persons outside the United States who come into possession of this prospectus supplement and the attached prospectus must inform themselves about and observe any restrictions relating to the offering of the common stock and the distribution of this prospectus supplement and the attached prospectus outside of the United States.**

Unless otherwise indicated or the context requires otherwise, all references in this prospectus supplement to “Bank of America,” “BAC,” “we,” “us,” and “our” are to Bank of America Corporation. Capitalized terms used, but not defined, in this prospectus supplement are defined in the attached prospectus.

## **BANK OF AMERICA CORPORATION**

Bank of America Corporation is a Delaware corporation, a bank holding company, and a financial holding company. Bank of America Corporation was incorporated in 1998 as part of the merger of Bank of America Corporation with NationsBank Corporation. Our principal executive offices are located at Bank of America Corporate Center, 100 North Tryon Street, Charlotte, North Carolina 28255, United States of America, and our telephone number is (704) 386-5681. Additional information about us is available on our website at [www.bankofamerica.com](http://www.bankofamerica.com). We have included our web address as an inactive textual reference only. Except as specifically incorporated by reference in this prospectus supplement, information on our website is not part of this prospectus supplement.

### **Countrywide Acquisition**

On July 1, 2008, we completed our acquisition of Countrywide Financial Corporation (“CFC”) and its subsidiaries. In connection with this acquisition, CFC merged into our wholly-owned merger subsidiary (the “Countrywide acquisition”), with our subsidiary continuing in existence as the surviving entity and changing its name to Countrywide Financial Corporation.

### **Merger Agreement with Merrill Lynch**

On September 15, 2008, we announced that we had entered into an Agreement and Plan of Merger, dated as of September 15, 2008, with Merrill Lynch & Co., Inc. (“Merrill Lynch”). Under the merger agreement, our newly-formed wholly-owned merger subsidiary will, subject to the terms and conditions of the merger agreement, merge into Merrill Lynch (the “Merrill Lynch merger”), with Merrill Lynch continuing as the surviving entity and our wholly-owned subsidiary. Under the terms of the merger agreement, if the Merrill Lynch merger is completed, each share of Merrill Lynch common stock will be converted into 0.8595 (the “exchange ratio”) of a share of our common stock, each share of non-convertible preferred stock of Merrill Lynch will be exchanged for preferred stock issued by us having substantially identical terms, and convertible preferred stock of Merrill Lynch will remain outstanding after the Merrill Lynch merger and will thereafter be convertible in accordance with its terms into shares of our common stock based on the exchange ratio. Completion of the Merrill Lynch merger is subject to certain customary conditions, including, among others, approval of the stockholders of both Bank of America and Merrill Lynch and receipt of regulatory approvals.

In connection with the Merrill Lynch merger, we plan to hold a special meeting of the holders of our common stock at which these holders will be asked to approve the issuance of our common stock in the Merrill Lynch merger and other proposals. Our board of directors currently has fixed the close of business on October 10, 2008 as the record date for determining the holders of our common stock entitled to vote at this special meeting. This record date is subject to change by our board of directors. Purchasers of shares of common stock sold in this offering will be entitled to vote at the special meeting so long as they hold such shares on the record date.

On September 15, 2008, we filed with the Securities and Exchange Commission (“SEC”) a Form 8-K containing the press release announcing the Merrill Lynch merger. On September 18, 2008, we filed with the SEC a Form 8-K containing a copy of the merger agreement. On October 3, 2008, we filed with the SEC a Form 8-K containing historical financial statements of Merrill Lynch and preliminary unaudited pro forma condensed combined financial data which give effect to the Merrill Lynch merger, but do not reflect the Countrywide acquisition. Each of these Forms 8-K contains additional information and is incorporated by reference into this prospectus supplement. Copies of the reports on Form 8-K are available at the SEC’s website at <http://www.sec.gov>.

**THE OFFERING**

<b>Common stock we are offering</b>	455,000,000 shares of common stock, par value \$0.01 per share.
<b>Option to purchase additional shares</b>	We have granted the underwriters an option to purchase up to 68,250,000 additional shares of common stock if the underwriters sell more than 455,000,000 shares of common stock in this offering. The underwriters can exercise this right at any time and from time to time, in whole or in part, within 30 days of the date of this prospectus supplement.
<b>Common stock outstanding after this offering</b>	5,017,054,554 shares of common stock outstanding (or 5,085,304,554 shares of common stock if the underwriters exercise their option to purchase additional shares in full).
<b>Use of proceeds</b>	We estimate that the net proceeds of this offering will be approximately \$9.76 billion (or \$11.22 billion if the underwriters exercise their option to purchase additional shares in full). We expect to use the net proceeds of this offering for general corporate purposes.
<b>Risk factors</b>	See “Risk Factors” and other information included or incorporated by reference in this prospectus supplement for a discussion of factors you should consider carefully before deciding to invest in shares of our common stock.
<b>New York Stock Exchange symbol</b>	BAC

The number of shares of common stock to be outstanding immediately after this offering is based on 4,562,054,554 shares outstanding as of September 30, 2008 (which includes the approximately 106.7 million shares issued in the Countrywide acquisition), together with the issuance by us of 455,000,000 shares of our common stock in this offering, or 523,250,000 shares if the underwriters exercise their option to purchase additional shares in full. This number does not reflect any issuance of shares of our common stock in connection with the Merrill Lynch merger. If we complete the Merrill Lynch merger, we anticipate that we will issue approximately 1,193 million shares of our common stock in connection therewith. See “Capitalization.”

## RISK FACTORS

Your investment in our common stock involves risks. This prospectus supplement does not describe all of those risks. The following is a list of certain risks specific to our shares of common stock. Before purchasing any shares of our common stock, you should consider carefully these risks and the more detailed explanation of risks described in our Annual Report on Form 10-K for the year ended December 31, 2007 under the caption “Item 1A. Risk Factors,” as well as other information included or incorporated by reference into this prospectus supplement or the attached prospectus, including the additional risks identified in our Form 8-K filed with the SEC on October 6, 2008.

### **Our share price may fluctuate.**

The market price of our common stock could be subject to significant fluctuations due to a change in sentiment in the market regarding our operations or business prospects, the Merrill Lynch merger and our potential assumption of Merrill Lynch’s debt securities, our intended assumption of CFC’s debt, future sales or acquisitions to which we are party, this offering, or future sales of our securities. Such risks may be affected by:

- operating results that vary from the expectations of management, securities analysts, and investors;
- developments in our business or in the financial sector generally;
- regulatory changes affecting our industry generally or our business and operations;
- the operating and securities price performance of companies that investors consider to be comparable to us;
- announcements of strategic developments, acquisitions, and other material events by us or our competitors;
- our ability to integrate the companies and the businesses that we acquire, including Merrill Lynch and CFC;
- changes in the credit, mortgage, and real estate markets, including the market for mortgage-related and other asset-backed securities; and
- changes in global financial markets and global economies and general market conditions, such as interest or foreign exchange rates, stock, commodity, credit or asset valuations or volatility.

Stock markets, in general, have experienced over the year, and continue to experience, significant price and volume volatility, and the market price of our common stock may continue to be subject to similar market fluctuations that may be unrelated to our operating performance or prospects. Increased volatility could result in a decline in the market price of our common stock.

### **There may be future sales or other dilution of our equity, which may adversely affect the market price of our common stock.**

Except as described under “Underwriting,” we are not restricted from issuing additional common stock or preferred stock, including securities that are convertible into or exchangeable for, or that represent the right to receive, common stock or preferred stock. The issuance of additional shares of common stock or convertible securities will dilute the ownership interest of our existing common stockholders. The market price of our common stock could decline as a result of this offering as well as other sales of a large block of shares of our common stock or preferred stock or similar securities in the market after this offering, or the perception that such sales could occur. In addition, the conversion ratio of our convertible securities is subject to



certain anti-dilution adjustments and any adjustment of these conversion ratios could further dilute our common stockholders.

**You may not receive dividends on the common stock.**

Holders of our common stock are only entitled to receive such dividends as our board of directors may declare out of funds legally available for such payments. Furthermore, holders of our common stock are subject to the prior dividend rights of holders of our preferred stock or the depositary shares representing such preferred stock then outstanding. Although we have historically declared cash dividends on our common stock, we are not required to do so and may reduce or eliminate our common stock dividend in the future.

**The common stock is equity and is subordinate to our existing and future indebtedness and preferred stock.**

Shares of the common stock are equity interests in us and do not constitute indebtedness. As such, shares of the common stock will rank junior to all of our indebtedness and to other non-equity claims against us and our assets available to satisfy claims against us, including in our liquidation. Additionally, holders of our common stock are subject to the prior dividend and liquidation rights of holders of our outstanding preferred stock or the depositary shares representing such preferred stock then outstanding. Our board of directors is authorized to issue additional classes or series of preferred stock without any action on the part of the holders of our common stock. As of September 30, 2008, the aggregate liquidation preference of all our outstanding preferred stock was \$24.2 billion. In addition, if we complete the Merrill Lynch merger, we intend to issue additional shares of our preferred stock in exchange for Merrill Lynch preferred stock. The common stock will also be subject to prior dividend and liquidation rights of this additional preferred stock.

**If we are deferring payments on our outstanding junior subordinated notes or are in default under the indentures governing those securities, we will be prohibited from making distributions on the common stock.**

The terms of our outstanding junior subordinated notes prohibit us from declaring or paying any dividends or distributions on our capital stock, including our common stock, or purchasing, acquiring, or making a liquidation payment on such stock, if we are aware of any event that would be an event of default under the indenture governing those junior subordinated notes or at any time when we have deferred payment of interest on those junior subordinated notes.

**Our ability to pay dividends depends upon the results of operations of our subsidiaries.**

We are a holding company that conducts substantially all of our operations through our bank subsidiaries and other subsidiaries. As a result, our ability to make dividend payments on the common stock depends primarily upon the receipt of dividends and other distributions from our subsidiaries. There are various regulatory restrictions on the ability of our banking subsidiaries to pay dividends or make other payments to us.

In addition, our right to participate in any distribution of assets of any of our subsidiaries upon the subsidiary's liquidation or otherwise, and thus your ability as a holder of the common stock to benefit indirectly from such distribution, will be subject to the prior claims of creditors of that subsidiary, except to the extent that any of our claims as a creditor of such subsidiary may be recognized. As a result, the common stock effectively will be subordinated to all existing and future liabilities and obligations of our subsidiaries.

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**You should rely only on the information incorporated by reference or provided in this prospectus supplement and the attached prospectus. We have not authorized anyone to provide you with different information. We are not offering the securities in any jurisdiction where the offer is not permitted. You should not assume that the information in this prospectus supplement is accurate as of any date other than the date on the front of this document.**

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**455,000,000 Shares  
of Common Stock**

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**PROSPECTUS SUPPLEMENT**

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**Banc of America Securities LLC**

**Merrill Lynch & Co.**

**October 7, 2008**

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